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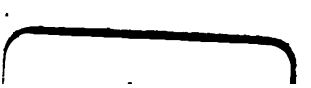

TREATISE

ON THE

OFFICES

OF

JUSTICE OF PEACE; CONSTABLE;
COMMISSIONER OF SUPPLY;
AND
COMMISSIONER UNDER COMPREHENDING ACTS,
IN
SCOTLAND;

WITH
OCCASIONAL OBSERVATIONS
UPON
OTHER MUNICIPAL JURISDICTIONS.

TO WHICH ARE ADDED,

APPENDIXES,

CONTAINING

SOME OF THE STATUTES, FORMS OF PROCEEDINGS, AND WRITS, REFERRED TO IN THE WORK.

By GILBERT HUTCHESON, Esq. Advocate.

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A

TREATISE

ON THE

OFFICES

OF

JUSTICE OF THE PEACE,
CONSTABLE,
COMMISSIONER OF SUPPLY,

AND COMMISSIONER UNDER THE COMPREHENDING ACTS,

IN SCOTLAND.

BOOK III.

OF THE POLICE.

Chap. I.—Of Police in general.

§ 1. POLICE DEFINED

I. MR. COLQUHOUN remarks, that police, in this country, may be considered as a new science; understanding by it, those powers and duties, which we have already considered as branches of preventive and remedial justice, as well as "those other functions which "relate to internal regulations for the well ordering and "comfort of civil society[a];" or (to use the words of

Mr. Colquhoun's definition.

[a] Treatise on the police of the metropolis, preface.

§ 1. POLICE DEFINED.

judge Blackſtone) "to the due regulation and domeſtic or-
"der of the kingdom; whereby the individuals of the ſtate,
"like members of a well governed family, are bound to
Black-ſtone's. "conform their general behaviour to the rules of propriety,
"good neighbourhood, and good manners, and to be de-
"cent, induſtrious, and inoffenſive, in their reſpective ſitua-
"tions [a]."

THE duty of juſtices of peace, with reſpect to this claſs of offences, is equally various and delicate.

ON the committing of murder, robbery, or other ſuch offences, we have already ſeen what ſteps muſt be taken by the magiſtrates as guardians of the public peace, which has been broken. We are now to conſider their juriſdiction, in relation to ſuch actions and line of conduct, as, though they do not, like the other malpractices, ſtrike at the exiſtence of civil ſociety, yet are inconſiſtent, at leaſt, with its well being. Under this book, therefore, falls to be noticed, ſuch regulations as have been made, touching idleneſs, vagrancy, foreſtalling, and regratting; weights and meaſures, &c. which will be explained in different chapters.

§ 2. ANCIENT REGULATIONS CONCERNING POLICE.

II. THE Scottiſh legiſlature appears to have been early prone to exerciſe juriſdiction in matters of police; and thus has afforded many warnings of the vanity of attempting to regulate things beyond the graſp of human legiſlation. Of their multiplied enactments, intended for encouraging trade, manufactures, and agriculture, and checking luxury and extravagance, few have ſerved any purpoſe, but to afford the hiſtorian and antiquary curious inſight into the manner of living, and ſtate of ſociety, in thoſe days [b].

Their inefficacy.

[a] B. iv, c. 12.

[b] Pinkerton's Retroſpects at the ſeveral periods of his hiſtory of Scotland.

§ 2. ANCIENT REGULATIONS CONCERNING POLICE.

CONSIDERING the miſtakes of more enlightened ages, we need not be ſurpriſed at the reiterated enactments "*for holding money within the realm*[a]," and againſt the having of victualles[b], ſheep and nolt[c], ſalt[d], wool[e], coal[f], and almoſt every other article, in thoſe days, deemed valuable, "furth of the realm." But" (ſays a learned author) "a man acquainted with the native qualities of the Scotch horſe, will ſmile to find, that thoſe ſorry palfries were not ſuffered to be ſold out of the kingdom[g]."

Anxiety to hold money within the realm.

ONE object, which the Scottiſh legiſlature long attempted with as little ſucceſs as any, was the regulation of female dreſs: that the ladies might not put their fathers and huſbands to more expence than ſuited their rank and fortune; or, in the ſtatutory language, that "they make their wives and daughters in like manner be abuilzied, *ganand; and correſpondant fra their eſtate;* that is to ſay," (in the caſe of the wives and daughters of citizens, not in the magiſtracy, and of "barones, and uther puir gentlemen, within fowrtie pound of auld extent,") "on their heads ſhort curches, with little hudes, as ar uſed in Flanders, England, and uther cuntries; and as to their gowns, that na women wear mertrickes, nor letteis, nor tailes unfit in length, nor furred under, bot on the halie daie[h]." In theſe prohibitions, that the ſaving of expence to the "puir gentlemen" was chiefly in view, and not any diſlike to the ſhewy dreſſing of ladies, appears not only from the above exception in the caſe of the "halie daie," but alſo from the ſtill minuter directions to wives, "within ane hundred poundes" (of land rent), to "wear na *ſilk in lyning*, bot

Attempt to regulate the dreſs.

Female apparel.

[a] 1425, c. 49; 1436, c. 149; 1449, c. 29; 1451, c. 34; 1466, c. 8; 1540, c. 108, &c.
[b] 1555, c. 45.
[c] 1581, c. 114.
[d] 1573, c. 58.
[e] 1577, c. 250.
[f] 1597, c. 253.
[g] Wallace's Peerage, p. 47. 1424, c. 34.
[h] James II, parl. 14, 1457, c. 70.

§ 2. ANCIENT REGULATIONS CONCERNING POLICE.

" allenarlie in coller and ſleeves, under the ſamin paine," (a fine of twenty pounds to the king [a]); and to the huſbandmen's wives, to dreſs " in courchies of their awin mak- " ing [b]." Regulations were alſo made reſpecting the dreſs of the men; ſo particularly, indeed, that directions were given both for the halie day and work days dreſs of the commonalty, " that na labourers nor huſbandmen weare on " the *warke* daye, bot gray and quhite; and *in the halie day* " bot licht blue." So late as the reign of James VI, theſe regulations were ſtill farther extended by a ſtatute [c], which mentions what privileged perſons ſhould wear ſilk, clothing, or ſilver; and very minutely deſcribes in what manner apparel ſhould be ornamented; and concludes, with ſtatuting and ordaining, that " *the faſhion of cloaths now preſently uſed* be " not changed by men nor women, and the wearers there- " of, under the paine of forefaultrie of the cloaths, and of " an hundred pounds, to be paid by the wearer, and as " much by the maker of ſaid cloaths [d]." And, ſtranger ſtill, even ſubſequent to the Revolution, we find in the parliamentary minutes, an " overture for an conſtant faſhion for cloaths " for men, and another conſtant faſhion for cloaths for wo- " men, read, and remitted to the *committee for elections* [e]:" which commiſſion appears to have been executed with all due attention and diſpatch; for there ſoon follows another minute in theſe terms, " Draught of an act, brought in by " *the committee for controverted elections*, ordering an conſtant " habit of cloaths for men, and another conſtant habit of " cloaths for women;—read the firſt time, and ordered to " lie on the table [f].

Wives and daughters directed to dreſs in courchies of their own making.

[a] James III, parl. 6, 1471, c. 45.
[b] James II, 1457, c. 70.
[c] James VI, parl. 23, 1621, c. 25.
[d] Ibid.
[e] Sept. 22, 1696. Parliament held at Edinburgh by the earl of Tullibardine, as high commiſſioner to king William.
[f] 5th Oct. 1696.

§ 2. ANCIENT REGULATIONS CONCERNING POLICE.

BUT what ſeems to have given the greateſt uneaſineſs, was the uſe of the veil; which, however, for ages, continued in defiance of the legiſlature [a]. Many and anxious are the prohibitions, "that na woman cum to kerk nor mercat with "her face muffaled, or covered, that ſhe may not be kend, "under the pane of eſcheit of the courchie [b]." Trains, or "tailes, unfitt in length [c]," were alſo prohibited; and, what is amuſing, while in Scotland pains were taken to ſhorten the "tailes of the ladies," in England equal pains were taken to lengthen thoſe of the men [d].

Veil proſcribed.

Trains too long.

AMID this attention to public manners, the pleaſures of the table were not overlooked. Statutes were paſſed "againſt "ſuperfluous banqueting, and the inordinate uſe of confec-"tours and drogges;" on the narrative of "the inordinate "conſumption, not onlie of ſik ſtuff as growes within the "realme, bot alſwa of drogges, confectoures, and ſpiceries, "brocht from the pairts beyond ſea, and ſauld at dear prices "to *manie folke that are very unabill to ſuſtene that coaſte*[e]."

Luxury of the table.

BUT that we may not be led from ſuch enactments to entertain too high ideas of the wealth and refinement of our anceſtors, ſir George Mackenzie, in his obſervations on one of them, remarks, "that the laws of the twelve tables con-"tained ſeveral ſumptuary laws, *though there was then little* "*luxury* [f]."

IN like manner, government undertook the regulation of the amuſements likewiſe, and recreations of youth. After the return of James I from England, enactments were repeatedly made, "that the fute-ball and golfe be utterly cried down [g];"

Amuſement and recreation.

Golf, foot-ball.

[a] Pinkerton, vol. ii, p. 435.

[b] 1457, c. 71.

[c] Ib.

[d] 3 Edw. IV, Henry's Hiſt. v. 2, 309.

[e] 1581, c. 114; 1621, c. 25.

[f] Obſervations on parl. 23, James VI, act 25.

[g] 1424, c. 17; 1457, c. 65.

§ 2. ANCIENT REGULATIONS CONCERNING POLICY.

and "that in na place of the realme, there be uſed fute-ball, "golf, or uther ſik unprofitable ſports [a]."

UNDER the ſame ſuperintending care, with a view to public and private happineſs and comfort, parliament ſometimes reſtricted individuals even in the uſe of their own property; for example, they prohibited "the laying of lint in lochs "and burns," as "not only hurtful to all fiſhes bred within "the ſamine, and beſtial that drinks thereof, but alſo the "haill waters of the ſaid lochs and burnes, thereby being "infected, is made altogether for the uſe of man, and very "noyſome to all the people dwelling there about [b]:" Which exerciſe of property, ſir George Mackenzie obſerves, it ſeems that the parliament alone can reſtrain, "elſe this act had "been needleſs [c]; wherefore he ſtates it as queſtionable, whether *paritas rationis* ſhould extend this act againſt "ſuch as lay ſtinking hides, or other ſuch noyſome things "in the loches or burns [d]." But what limitations in the uſe of property, whether within or without borough, proprietors are under for the ſake of their neighbours or of the public, being a ſubject of practical importance, ſettled by many later deciſions, will come more particularly under our notice in the chapter relative to the public health and convenience. In the meanwhile, we proceed to thoſe other branches of the police, to which we have devoted ſeparate chapters.

Nuiſance. Steeping of lint.

Sir George M'Kenzie's opinion of common law right.

[a] 1491, c. 32.
[b] 1606, c. 13.
[c] Obſervations, p. 234.
[d] Ibid.

CHAP. I.

Of the Laws relative to the necessitous Poor.

§. 1. THE poor are noticed by the Scottiſh ſtatutes under two claſſes. The one are unable to work: the other, unwilling. The latter are checked and puniſhed by many ſevere enactments: the former are ſuitably maintained by a tax, which is levied from the other members of the community; this religious duty appearing likewiſe a prudent and neceſſary meaſure of polity. GENERAL VIEW AND HISTORY.

BUT the ſevere and ſalutary diſcipline can neither, juſtly nor effectually, be inflicted upon the one claſs of poor, while the ſupport of the other is neglected. Thus intimately connected together, both theſe branches of political economy are generally regulated by the very ſame ſtatutes. And both furniſh various and important duties to juſtices of the peace; to the vigilance and activity of which magiſtracy is the execution of the penal enactments againſt idleneſs and vagrancy principally intruſted; while the regular eſtabliſhment of parochial aſſeſſments for helpleſs indigence, has, in more than one place of the country, been firſt

§ 2. GENERAL VIEW AND HISTORY.

accompliſhed by the laudable interpoſition of the ſeſſions of the peace.

Jews.

IN the ancient Heathen world, the duty of providing for the *collective poor*, ſcarcely appears to have ever occurred as a ſubject of ſpeculative inquiry; ſtill leſs of practical policy [a]. In the Jewiſh law it was reduced into a ſyſtem. The general duty was inforced; and various proviſions were made for its effectual accompliſhment.

Moſaical law not elſewhere obligatory.

THE Moſaical inſtitutions, addreſſed and adapted to the Jews in Canaan, are, ſtrictly ſpeaking, not elſewhere obligatory [b]. However, "in the conſtitution of human laws, "chief reſpect ought to be had to the judicial laws of God; "and they aſſumed, where the inclination of the people "and their condition do not render them inconvenient [c].

Lord Stairs' opinion of its uſe.

[a] "In what is called the body of "the Roman law, we meet with or-"dinances for the regulation and "protection of hoſpitals for the ſick, "for the aged, for orphans, for wi-"dows, for travellers, for infants, "and for almoſt every kind of cha-"rity encouraged among ourſelves; "but it is not amongſt the laws of "the Roman kings, nor among thoſe "of the twelve tables, nor amongſt "the decrees of the republican ſe-"nate, nor amongſt the edicts of "the *heathen*, but amongſt thoſe of "the Chriſtian emperors, that we "meet with them." See biſhop Watſon's Sermons, p. 40.

[b] Many eminent divines and lawyers, and, among others, the famous Scotus, thought it unlawful to puniſh any crime capitally, which the Moſaical law puniſhes arbitrarily. Even Grotius does not very decidedly condemn this opinion. Eſt autem valde probabilis Scoti ſententia fas non eſſe quemquam ad mortem damnare, niſi ob delicta quæ lex per Moſem data morte punivit, additis duntaxat aut quæ his ſunt paria recta æſtimatione; neque enim videtur notitia divinæ voluntatis quæ ſola animum tranquillit, aliunde in hoc negotio tam gravi haberi poſſe quam ex illa lege, quæ certe mortis pœnam in furem non conſtituit. (De jure Belli et pacis.)

This queſtion, whether the Moſaical inſtitution reſpecting puniſhments, are, to the extent above mentioned, perpetually binding, was conſidered by the court of juſticiary on a learned argument in the caſe of John Macpherſon, tried capitally for ſtealing two horſes. The court condemned the pannel to death. Dec. 1743. Maclaurin, No. 48, p. 744.

[c] Stairs' Inſt. b. i, tit. 1, § 9.

Throughout Chriſtendom, accordingly, thoſe commands that are of a more general import, as being the written law of nature, often become the ground work of the common law. And (to uſe the language of a learned Engliſh judge, in a queſtion where the Jewiſh code was pleaded in ſupport of a particular cuſtom, in this very matter of poor laws), "what "better fountain could it be drawn from than the holy ſcrip- "tures [a] ?" § 1. GENERAL VIEW AND HISTORY.

PERHAPS, therefore, it may not be improper to conſider the charitable proviſions of that venerable diſpenſation more minutely.

FIRST, certain ſubjects were expreſsly reſerved as a fund for maintaining the poor. 1. Poors fund.

ONE ſource from which they derived a maintenance, was the corners of the fields. "*And when you reap the fields of* "*your land, thou ſhalt not wholly reap the corners of thy field* [b]." Liberally conſtrued, this precept included all annual productions, the fruits of the trees, as well as corn. What preciſe proportion of the field came under this deſcription, is not mentioned in ſcripture; but, in practice, was fixed at a *ſixtieth* part [c], which (the *minimum*) the poor could by law exact from the moſt churliſh, while the charitable gave more, according to their reſpective inclinations and abilities.

ANOTHER fund, ſet apart for the poor, was the gleanings of the harveſt and vintage. "*Neither ſhalt thou gather any* "*gleanings of thy harveſt.*"—"*Neither ſhalt thou glean thy* "*vineyard; and thou ſhalt not gather every grape of thy vine-* "*yard* [d]." If three or more ſtalks of corn, or three or more cluſters of grapes, fell at once to the ground, they Gleanings.

[a] See below, p.

[b] Levit. c. xix, v. 9, c. 23, v. 22.

[c] Selden *de jure naturali, &c. Gentium juxta. Ebre.* &c. lib. 6, c. 6, p. 692.

[d] Levit. ibid. Deut. c. xxiv, v. 20, 21.

§ 1. GENERAL VIEW AND HISTORY —JEWISH CODE.

could be taken up as ſtill the property of the owner of the crop; but if leſs than three happened to fall as gleanings, they belonged to the poor [a]. Under the laſt clauſe, cluſters of an inferior quality are to be left to the poor [b].

Forgotten fruits, or corns.

IN like manner, whatever ſheaves of corn, or other fruits, were forgotten in the field, belonged to the poor. "*When* "*thou cutteſt down thine harveſt in thy field, and haſt forgot a* "*ſheaf in thy field, thou ſhalt not go again to fetch it* [c]." Like the firſt precept, this was not confined to corn, but was liberally extended to grapes and fruits [d]. If the workmen forgot, when the maſter did not, or *vice verſa*, or though both the workmen and the maſter forgot, yet if a paſſenger timely put them in remembrance, in ſuch caſes this precept was not underſtood to apply [e]. But as thoſe regulations were not intended for the benefit of the "beaſts of the "field, and birds of the air," ſo, if the poor did not collect them in due time, according to the uſage of the place, they forfeited their excluſive right to ſuch gleanings, and forgotten fruits; which, in that caſe, became the property, either of the huſbandman again, or of any other perſon [f], though not among the number of the poor, who choſe to take them.

Tithe every third year.

THE moſt important proviſion in favour of the poor, appears to have been their right to a tenth of every third crop. "*At the end of three years, thou ſhall bring forth all the tithe of* "*thine increaſe the ſame year, and ſhalt lay it up within thy*

[a] Seld. ibid.

[b] Such, for example, as neither had ſcapulos denſiores nec uvas conjunctiores ſed tam has quam illas ita invicem diſperſas et diſtantes ut reliquorum ubertatem denſiorem haud imitarentur. Ibid.

How far this proviſion reſpecting gleaning is obligatory now, and how the law reſpecting it ſtands here and in England, ſee below, § 2.

[c] Deut. c. xxiv, v. 19.

[d] Seld. ibid.

[e] Ibid.

[f] Ibid. p. 699.

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" *gates. And the Levite, (becauſe he hath no part nor inherit-*
" *ance with thee) and the ſtranger, and the fatherleſs, and the*
" *widow, which are within thy gates, ſhall come, and ſhall eat,*
" *and be ſatisfied* [a]," &c. As the Greeks divided time into olympiads, or periods, of *four* years, and the Romans into *luſtra*, or periods of five years, ſo did the Jews into periods of ſeven years, called *hebdomada*. The *ſeventh* year they paid no tithe; for there was no crop. But each of the other ſix years they paid two tithes; *one* to the Levites, whereof the latter, again, yielded a tenth to the prieſts, called *decima decimarum*. The *other*, a tenth of the remaining nine parts of the produce, in diſtinction to the *firſt*, or Levites' tithe, was called the *ſecond* tithe. Every firſt, ſecond, fourth, and fifth, year, this ſecond tithe " was ſpent at the temple in feaſts, " not unlike the *agape* of the primitive Chriſtians [b]." Every third and fifth year, it was " *beſtowed at home, within their* " *own gates, upon the poor and the Levites* [c]."

Olympiads. *Luſtra.* *Hebdomada.*

Tithes, how many kinds.

1ſt tithe.

2d tithe.

Poors' tithe.

THE only other fund to be noticed, is almſgivings. " *If* " *there be among you a poor man, of one of thy brethren, within* " *any of thy gates in thy land, which the Lord thy God giveth* " *thee, thou ſhalt not harden thy heart, nor ſhut thy hand from* " *thy poor brother; but thou ſhall open thy hand wide unto him,* " *and ſhall ſurely lend him, ſufficient to his need, in what he* " *wanteth*," &c.—" *Thou ſhall ſurely give him; and thine* " *heart ſhall not be grieved when thou giveſt unto him* [d]." Among the other funds, it is correct here to enumerate alms, which the Jewiſh magiſtrate had authority to compel the churliſh and reluctant to give ſuitably to their circumſtances and the exigency of the caſe [e].

5, Alms.

Alms, compulſory.

[a] Deut. c. xiv, v. 28, 29.

[b] Forbes's Treatiſe on tithes, c. 5.

[c] But whether this poor tithe really was a different application of the *ſecond* tithe, as Selden and Pool (Synopſis criticorum, &c. ad loc.) think, " or a third extraordinary " tithe, diſtinct from both the Le- " vite's tithe and it;"—" they're " (ſays Mr. Forbes, ibid.) wiſer than " I can tell."

[d] Deut. c. xv, v. 8, 9, 10.

[e] Si quis autem eleemoſynam erogare, juxta quod oportuit, detrecta-

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In each town, or diſtrict, it became uſual, in practice, to appoint collectors, to whom, on the evening of the Sabbath, individuals (if they did not chooſe to be diſpenſers wholly of their own charity) paid their weekly offering, and by whom, after careful ſcrutiny, diſtribution was made among the poor, according to their ſeveral neceſſities; of money from the box (*arca*); of proviſions from the large cheſt (*ſcutella* [a]). The former was uſed univerſally; the latter in ſome particular places only [b].

Collectors for the poor

Arca.

Scutella.

Strangers not liable in their poor laws.

It is remarkable that none of the above regulations were underſtood to be binding on wealthy ſtrangers living among them, even though they had attained the degree of *proſelytus juſtitiæ* [c]. So far was this carried, that if a Jew and ſtranger were joint partners of a field, the law reſpecting the corner, gleanings, as well as forgotten ſheaves and fruits, applied to the one half only [d]. Alms, again, inſtead of be-

Common property between ſtranger and Jew.

ret, *ſententia forenſi coercendus erat* in id præſtandum quod foro placeret, idque *non ſine plagarum pœna* niſi pareret. Quod ſi demum non faceret, e bonis ſuis id quod erat præſtandum in pignus ſuſtulere judices. So far Mr. Selden. (Ibid. p. 695.)

The following are the words of the Talmud itſelf reſpecting this remarkable regulation. Qui non voluit eleemoſynam dare, aut minorem dederat quam erat ei par; *cogebant eum judices fori ſeu ſynedrium, irrogata etiam pœnâ verborum*, quæ contumacibus debita, uſque dum id præſtaret quod ipſi eſtimarent. *Quin et irruebant in bona ejus eoque præſente* quantum oportuit eum erogare, ut in pignus eleemoſynæ, ſcripiebant. Ibid.

[a] Seld. ibid.

[b] Neque vidimus neque audivimus in eccleſia aliqua ſeu univerſitate Iſraelitarum, defuiſſe arcam eleemoſinæ. Sed ſcutellam quidem loci alii habent, alii non habent pro moris diverſitate." (Maimonides apud Selden, ibid. p. 698.)

[c] Si Gentilis in ditione Iſraelitica poſtquam ſegetem meſſuerat, proſelytus juſtitiæ factus fuiſſet, ex ſegete illa neque angulus neque ſpicilegium neque manipulus per oblivionem derelictus, pauperibus relinquendus; tametſi manipulis jus non inciperet ante tempus quo manipuli avehi ſoliti. Id eſt etiam poſtquam proſelytus eſſet factus. (Ibid. 701.)

[d] Ubi Iſraelita et Gentilis ſocii erant vineæ in parte Iſraelitæ (diviſa) relinquendi erant acini decidui et racematio. Sed pars Gentilis immunis erat. (Thalmud, c. iv, ibid. 701.)

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ing legally exigible, were not allowed to be taken from a pagan, although he offered them. However, the caſe of abſolute neceſſity was excepted. If the charity of their countrymen did not ſuffice for the ſupport of the poor, they were allowed to receive alms from ſtrangers [a]; but donations ſent them by princes and great men [b], they received *propter regiæ dignitatis obſervationem*; however, when they could, without danger of diſcovery, they generally gave them away to the heathen poor among them [c]. Which delicacy, Scaliger remarks, they ſtill retained after their diſperſion. By ſupplying their wants, the richer Jews took care to keep the poor of their nation from begging [d].

Alms not taken from ſtrangers.

Exception.

Donations ſent by heathen kings, &c.

THIS delicacy, however, they do not appear to have everywhere obſerved; if, at leaſt, we may credit two ſatyriſts, the one of whom takes as a common occurrence, the example, *Arcanam Judæa tremens mendicat in aurem* [e]; while the other, among the evils of a reſidence in Rome, ſpecifies the unceaſing and trained importunity of Jewiſh beggars: *Nec turbæ ceſſat*, &c *A matre doctus nec rogare Judæus* [f].

SECONDLY.—The deſcription of perſons intitled to take the benefit of thoſe funds, appears to have been accurately fixed. Moſes, indeed, ſays generally, the poor "fatherleſs,

2, Who intitled to charity.

[a] Fas non erat Iſraelitæ accipere Eleemoſynam a Gentilibus palam ac in aperto. Adjecta tamen exceptione hac. Si Eleemoſynæ ſuorum vitæ ſuæ neceſſariis non ſufficerent, nec Gentilium Eleemoſynam clam accipere poſſet; tunc quidem licuiſſe. (Thalmud, apud Selden, ibid. 701.)

[b] Quin, ſi rex aut princeps e Gentilibus pecuniam in Eleemoſynam ad Iſraelitas mitteret, eam ſane rejicere mos non fuit, propter regiæ dignitatis obſervantiam. Ibid.

[c] Reciepiebant ergo, ſed clanculum erogabant pauperibus Gentilium, adeoque ut rex neſcirit. Ibid.

[d] Veri Judæi non mendicabant, neque mendicant hodie propter φιλαλήλους eorum, quod divites non patiuntur tenuiores mendicare aut eſurire. Elon. Trih. ext. cum Druſio de ſectis judaicis.

[e] Juvenal Satyr. 6, 544.

[f] Martial, lib. xii, epig. 57.

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"widow, and ſtranger." But certain rules ſeem to have been acknowledged by their courts. Thus, 1ſt, thoſe were not admitted to partake of the poor funds, who had either fifty ſacred ſhekels not out on trade, or twelve out on trade [a]. If he had leſs than fifty ſhekels not out at trade, he was intitled to the benefit of all the above-mentioned funds [b]. 2dly, In eſtimating what a man had, the debts (even his wife's dowry) which he owed, were deducted [c]. 3dly, A man was not obliged to ſell his houſe and furniture, to intitle him to take the benefit of theſe proviſions [d]. But if he was reduced to the loweſt ſtate, of deriving his ſubſiſtence from the common box, or weekly diſtribution of alms, he was obliged to diſpoſe of all articles of any value, and be content with ſuch in their place as were cheapeſt and ſtrictly neceſſary [e]. 4th, As, in thoſe days, they had little conveniency for obtaining remittances, it was ſpecially provided, that if any traveller run out of money in the courſe of his journey, he ſhould be intitled to

Pauper, when obliged to ſell his furniture, &c.

Travellers.

[a] Qui haberet in bonis ducentos zuzos, (id eſt quinquaginta ſiclos ſacros) licet cum iis non negotiaretur; aut qui quinquaginta et cum eis negotiaretur, is in eis non erat habendus quibus licuit ſpicilegio, frugibus per oblivionem in agro relictis, Angulo et Decima pauperis gaudere. (Maimon. apud Seld. ibid. p. 697.)

[b] Si cui pauciores quam ducenti eſſent (nec in negotiationibus eis uteretur) tametſi mille homines ſimul eum dona præberent, nihilominus et jam dictis gaudere fas erat. (Idem. Ibid.)

[c] Si pecuniam ſeu opes quidem haberet, quæ tamen ære alieno aut doti uxoriæ eſſent obnoxiæ, fas erat ei ſibi ea etiam ſumere. (Idem. Ibid.)

[d] Si egenus eſſet qui villulam, et ædas inſtructas haberet etiam rebus argenteis et aureis, mos non erat ut is cogendus eſſet vendere ædes ſuas et res ei inſervientes (ut ſciliſſet inde viveret et a jam dictis arceretur, ſed) ea accipiebat, et ex præcepto eis gaudere debuit. (Idem. Ibid.)

[e] At vero ſi ei eſſent utenſilia aurea vel argentea qualia ſtrigilis aut piſtillum et quæ ſunt ſimilia (lautioris et ſplendidioris vitæ inſtrumenta) vendenda ea erant atque id genus minoris pretii alia ei inde ſupplenda. Quæ tamen exceptio locum tantum habuit antequam ex eleemoſynis publicis ſeu eleemoſynarum ærario al inciperet. *Similac enim incipiebat inde ali (ſeu alimenta inde pelebat) cogendus erat vendere res illas pretioſas et veliores accipere.* Ec dein fortuna Anguſtiori contentus eſſe debuit. (Idem. Ibid.)

take the benefit of all the kinds of poor funds, without being obliged, on his return home, though in good circumſtances, to repay the ſupply which he thus had received when he truly was in need [a]. 5thly, Whether, under the term *ſtranger*, any heathen could claim relief by law; or whether only proſelytes were underſtood? it ſeems to be the import of the rabbinical conſtitutions, that, if there was a ſufficiency for all, heathen ſtrangers, who mingled with the native poor, ſhould be ſupplied indiſcriminately, without any other ſcrutiny, except as to the reality and degree of their neceſſities [b]. The ſatyriſt, therefore, exaggerates, when he repreſents them ſo unſociable *as non monſtrare vias eadem niſi ſacra colenti* [c].

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Strangers.

Heathen ſtrangers.

THIRD. In order to direct the exerciſe of charity, where there was not a ſufficiency for all the poor, it was laid down, that poor relations, the poor of the neighbourhood, or city, or county, or nation, &c. were reſpectively preferable [d].

3, Rules reſpecting charity.

Preferences among the poor.

In commanding the duty of almſgiving, Moſes uſes the

[a] Si patrifamilias per urbes aliquot et oppida proficiſcenti commeatus primo ſufficerat et dein (ante reditum) indiguerat ille quod comederet, ei competebat ſumere ſpicilegium fruges per oblivionem relictas, Angulum et decimam pauperis atque etiam ex erario eleemoſynarum ali. Neque poſtquam domum redierat obligatus erat ad reſtituendum. *Nam tunc temporis (quo acciperet) pauper ſeu pauperum numero cenſendus erat.* (Maimon, ibid. 697.)

[b] At vero tum proſelytis domicilii tum aliis Gentilibus ex jure ſuperinducto permiſerunt (quod ſecundo loco animadvertendum) in omnibus jam dictis ſortem, ſi pauperum, qui e Judæis, turbæ ſe commiſceret. Mr. Selden then quotes from the Talmud the following ſentence: Ceterum tametſi ex ipſa lege ſe res ita habebat, nihilominus non arcebant pauperes Gentilium a donis jam dictis, ex illis ſcilicet prioribus. Sed ii commiſti turbæ pauperum ex Iſraelitis ea acciperunt. Cauſa redditur ob vias pacis," id eſt officioſæ humanitatis ſeu charitatis cauſa. (Ibid. p. 700.)

[c] Juvenal Sat. xiv, 103.

[d] Inops qui fuerit cuiquam propinquus, præferendus aliis quibuſcunque; inopes domeſtici inopibus urbis; urbis ſuæ, inopibus urbis alienæ; juxta

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expreſſion "*ſufficient for his need in that which he wanteth* [a]." This precept the rabbins branched out into anxious and minute directions, to proportion the ſupply, as much as poſſible, to the pauper's former ſtation and circumſtances.

Rule for determining the meaſure of ſupply.

BUT neither former rank, nor any other circumſtance, was ſuſtained as an apology for the poor living in idleneſs. No one was intitled to charity, who did not, by ſome uſeful induſtry, ſo far as he could, contribute to his own ſupport [c]. By the fruits of their induſtry, together with the aſſiſtance they obtained by means of the privilege of gleaning, corners of the fields, and forgotten ſheafs, many, it is ſaid, ſo comfortably ſubſiſted, that they refuſed to accept of alms, whether offered to them by private individuals, or by the collectors of the weekly box [d].

Poor behove to work.

THE Chriſtians, though conſiſting of all nations, and languages, were early celebrated for their care of the poor.

quod in lege ſcriptum eſt, "fratri "tuo, pauperi tuo Inopi, tuo, in terra "tua." (Deut. xv, c. 11. Thalm. ibid. p. 696.)

[a] Deut. c. xv, v. 7.

[b] Sed mirum eſt quod tradunt de Eleemoſynæ heic tum qualitate tum quantitate. Neque enim ſuffeciſſe volunt, ut quis opulentus inopibus rogantibus vitæ ſimpliciter neceſſaria donaret, compararetve, veluti veſtitum et alimenta. Etiam utenſilia *domeſtica, uxorem item et maritum (cælebibus qui indigerent, pauperum nomine heic venientes) quin et ea inſuper quæ ad priſtinæ unde decederant vitæ ſortiſque ſplendorem* ſpectarent, ex legibus hiſce ſacris docent fuiſſe ſubminiſtranda. (Selden, p. 695.)

[c] Ceterum tametſi priſtini ſplendoris et anteactæ vitæ unde inops deciderat, ratio erat ut paulo ante dictum eſt, habenda, et juxta eam eleemoſynæ ſubminiſtrandæ, attamen in mandatis dederunt ſapientes ut, *qualiſcunque fuiſſet ante dignitatis inops, artificio alicui jam ſedulo incumberet, ut inde minus eſſet aliis ſeu eleemoſynarum ærario oneri.* (Selden, ibid. p. 698.

[d] Quod et ita feciſſe aliquot viros aiunt inſigniores ad paupertatem aliàs ſummam redactos ut nec rogarent ab univerſitate ſeu populo (id eſt ab exactoribus illis qui populi eleemoſynam corrogarent erogerentque) nec acciperent ab eo quando ipſis donare volebant. (Ibid.)

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There was none "*among them that lacked.*" The weekly contributions were laid down "*at the apoſtle's feet: and diſtribution was made unto every man according as he had need*[a]." In the reign of Conſtantine the Great, Chriſtianity becoming the religion of the empire, its charities aſſumed the more ſplendid appearance of hoſpitals for the aged, for orphans, for the ſick, for travellers, &c. beſides endowments in favour of the church. And wherever the hierarchy prevailed, the poor have ever been, too abundantly perhaps, and too indiſcriminately, ſupplied by the alms and hoſpitality of the monaſteries. In thoſe periods, therefore, a legal aſſeſſment for the ſupport of the poor would have been ſuperfluous.

BUT when the pious foundations, and charitable inſtitutions, of the Romiſh eſtabliſhment in this country were diſſolved, the deſtitute poor found no adequate ſupplies, either from the barons, who were enriched with the ſpoil; or from the preſbyterian clergy, who had with difficulty obtained a ſcanty ſubſiſtence for themſelves. Then firſt, therefore, the poor required, and generally (wherever the ſame cauſes operated) obtained legiſlative aid. In England, accordingly, abundance of ſtatutes were made in the reign of the firſt reforming monarchs, king Henry VIII and his children, for providing for the poor and impotent[b]. And in Scotland, ſoon after the Reformation, the act 1597, c. 74[c], ſtill the baſis of our poor laws, was paſſed, amid thoſe violent contentions between the laity, on the one hand, reſolute to maintain their acquiſitions; and the clergy, on the other, clamorouſly reclaiming the antient patrimony of the church, as ſacred to the ſupport of the poor, of ſchools, and other charities, which the former incumbents, notwithſtanding their oſtentatious and luxurious extravagance, had rarely ne-

[a] Acts, c. iv, v. 35.
[b] Blackſtone, b. i, c. 9.
[c] Appendix I.

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glected. This weighty and popular topic of complaint was removed by providing another fund for the maintenance of the poor.

IN the reign, indeed, of James I, we meet with ſtatutes[a] concerning the age and mark of beggars, and idle men[b]; which, however, merely deſcribe who are proper objects of private and eccleſiaſtical charity; their principal object, as well as that of all the enactments prior to the period already mentioned, appearing to have been the prevention and puniſhment of vagabonds.

THE ſtatute 1579 ſeems to have been intended for a general code, adapted to all claſſes of poor. A plan ſo extenſive in an untried[c] and difficult path of polity, the production too of an unlettered age, could ſcarcely be expected to appear at once perfect in all its parts. More fortunate, however, it has been than its contemporary the 43d of Elizabeth, the baſis of the Engliſh poor laws. For while our neighbours in England loudly complain, that, "in proportion as the wiſe regulations, that were eſtabliſhed in the long and glorious reign of queen Elizabeth, have been ſuperſeded by ſubſequent enactments, the utility of the inſtitution has been impaired, and the benevolence of the plan rendered fruitleſs[c]," we, in this country, have reaſon for congratulating ourſelves, that any defects and imperfections in our original enactment, have, as we ſhall ſee, been happily remedied, and the ſyſtem matured by ſucceſſive improvements. Originally, indeed, the benevolent plan ſeems, in both countries, to have commenced with equal advantages; and to have been as much alike, as it is now diſſimilar and oppoſite, in its ſpirit and effect. In Scotland, the aſſeſſment, in particular, is impoſed with every poſſible pre-

[a] Appendix I, No. 31.
[b] Appendix I, No. 31 and 33.
[c] Mr. Pitt's ſpeech on Mr. Whitbread's bill for reforming the Engliſh poor laws. Apud Eden's State of the poor, p. 311, vol. 3.

caution, and in ſtrict conformity to the principles of the Britiſh conſtitution. In England, the caſe is ſaid to be, in both reſpects, quite the contrary. There a tax, to the extent of millions, is yearly impoſed, at the diſcretion, in the firſt inſtance at leaſt, of church-wardens and overſeers, for the relief and ſupport of the poor. Here, again, in each pariſh, the miniſter, landholders, and elders, perſons of the firſt reſpectability, and who, in laying on an aſſeſſment, impoſe a tax on themſelves, hold regular and public meetings, for ſcrutiniſing, from time to time, the liſt of the poor, and aſcertaining the ſum neceſſary to be raiſed for their ſupport.

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THE effect of each ſyſtem is juſt what might be expected. Under the former, "more than one half of thoſe millions are thrown away in ſuits relative to pariſh ſettlements, *and ſquandered by the church-wardens and overſeers* in their feaſts, &c. with ſeveral other ſpecies of miſapplication and fraud[a];" whereas, amid all the heat and controverſy reſpecting the propriety of any compulſory proviſion for the poor, it has never been inſinuated that a ſixpence of the moderate fund, cautiouſly raiſed under the latter, has in any one inſtance been miſapplied. In England, while "the real purpoſe for which that heavy tax is laid, viz. the maintenance of the indigent and neceſſitous poor, is but little regarded, great ſums are ſpent in maintaining the idle and profligate[b];" whereas the ſtrict ſcrutiny of the heritors and elders, perſonally both acquainted with the pariſhoners, and intereſted to prevent impoſition, renders the Scottiſh poor liſt, as far as human foreſight can go, inacceſſible to any but the truly neceſſitous. "The able and idle, it is ſaid, get upon the roll. A pretty numerous roll of penſioners," ſays one, eminently qualified to judge of the effect of our poor laws, "whoſe caſes have for

[a] Lord Lyttleton's ſpeech on the Engliſh poor laws, Parl. reg. 1775.

[b] Mr. Gilbert, ibid.

§ 1. GENERAL VIEW AND HISTORY.

" many years been under my eye, is made up of the old, the " ſick, the widow, the orphan, the imbecile, the infane [a]."

THE Engliſh poor rates, therefore, may perhaps have been juſtly complained of, as rewarding vice, and diſcouraging induſtry. But, with us, " I can diſcern no relaxation of in- " duſtry from the hope of an aliment: the aliment is ſo " ſcanty and humiliating, that it rather operates as a ſtand- " ing admonition to be induſtrious and frugal. Inſtances " are not unfrequent of ſuch as recover ſtrength, reſigning " the penſions; of widows reſigning it as their children " grow up; and of children reſigning the charge of their " parents when providence puts it in their power [b]."

IN England, it is ſaid to be a queſtion, whether the poor or rich are more diſſatisfied with the poor laws? which bur- den the latter with exactions to ſo little purpoſe; and haraſs the former, as well as indeed all the lower ranks, by remov- als, " at the caprice of pariſh-officers [c];" " which have at " once increaſed the burdens of the poor, and taken from " the collective reſources of the ſtate to ſupply wants which " their operation had occaſioned, and to alleviate a poverty " which they tended to perpetuate [d]." Whereas the ableſt writers againſt a compulſory proviſion for the poor, find no- thing particularly exceptionable in the Scottiſh ſyſtem [e]. Even lord Kaimes himſelf, the great enemy of poor rates, is com- pelled to do homage to its excellency. " But if there be " ſuch a tax, I know of none" (ſays his lordſhip) " leſs ſub- " verſive of induſtry and morals than that eſtabliſhed in " Scotland, obliging the landholders in every pariſh to meet " at ſtated times, in order to provide for the poor; but " leaving the objects of their charity, and the meaſure, to " their humanity and diſcretion. In this plan, there is no

[a] Dr. Charles Lucas, vol. 2.
[b] Ibid.
[c] Mr. Pitt, ibid.
[d] Mr. Pitt, ibid.
[e] Dr. Macfarlane's Inquiry.

"incroachment on the natural duty of charity, but only that "the minority muſt ſubmit to the judgment of the majority[a]." § 1. GENERAL VIEW AND HISTORY.

If then the poor's laws of England, "however wiſe in "their original inſtitution," have been "obſcured by ſuch "corruptions[b]; if they have thus contributed to fetter the "circulation of labour, and to ſubſtitute a ſyſtem of abuſes "in room of the evils which they humanely meant to re-"dreſs, and by ingrafting upon a defective plan defective "remedies, have produced nothing but confuſion and diſ-"order[c];" their unpopularity, even among that opulent and munificent nation, need not ſurpriſe us: but we may reaſonably complain, that the natural fruits of ſo faulty a plan ſhould ever be miſtaken for neceſſary conſequences of all compulſory proviſions for the poor, or involve the Scottiſh ſyſtem likewiſe in one indiſcriminate blame and obloquy.

Hence, however, in ſome pariſhes, whoſe other funds are inſufficient for the ſupport of the neceſſitous poor, this unphiloſophical prejudice againſt poor rates, as if there were a ſpell in the very name, has too ſucceſsfully prevented the execution of our ſyſtem of poor laws; which, ſo far from partaking a common nature with the *Engliſh poor rates*, has providentially avoided the very ſource whence *derivata clades*, and evinces its ſound principles by its ſalutary operation. "In thoſe parts of Scotland where this law is obeyed "the good effects are manifeſt. The poor are delivered "from wandering under the infirmities of age, and their "children from hopeleſs ignorance, idleneſs, and ſhame-"fulneſs: they enjoy domeſtic comfort, and the fruits of "their remaining ſtrength, without being obliged to over-"ſtrain it: their children are educated under their own eye, Unreaſonable prejudice againſt the execution of the Scottiſh poor laws.

[a] Sketches of of the hiſtory of man book ii, ſk. 10.

[b] Mr. Pitt, ibid.

[c] Ibid. cccx.

§ 2. GENERAL VIEW AND HISTORY.

"&c.; the rich and the poor meet together in reciprocal "ſentiments of kindneſs and gratitude, and unite in attach- "ment to a conſtitution whoſe laws are ſo conſonant to the "Chriſtian law of love [a]."

IT is the general ſyſtem only of the Scottiſh poor laws to which this praiſe belongs. It muſt be confeſſed, that, on the ſpur of the moment, many enactments have paſſed, partial in their view, erroneous in their plan, and ſome of them even bringing us within imminent danger of thoſe very evils which have proved ſo fatal in England. Hence, therefore, on opening this part of the ſtatute book, it is not the practical excellence of the ſyſtem that firſt ſtrikes us, but rather an appearance of inconſiſtency, intricacy, and confuſion. Hence, accordingly, inquirers, who are not converſant in the learning of ſtatutes, have ſometimes been betrayed into harſh and diſreſpectful language. They do not conſider, that no branch of any juriſprudence, depending upon ſucceſſive enactments, which have been framed in the courſe of ages, amid the perpetual change of men, and in the manner of thinking and circumſtances of the country, either is, or, in the nature of human affairs, can be exempt from appearances of incongruity. But if occaſional errors have either been ſpeedily remedied, or have never at all taken effect, while the leading principle, originally ſound, has throughout maintained its ground, governing the deciſions of the courts, and the general practice of the country, this is the criterion of a wiſe and happy legiſlation. This praiſe, notwithſtanding the acknowledged defects of particular ſtatutes, or perhaps of ſome part of almoſt every ſtatute, may, without preſumption, be arrogated to the Scottiſh ſyſtem of poor laws. But the number of thoſe unwiſe, inconſiſtent, and forgotten, regulations, makes it proper and neceſſary to con-

[a] Dr. Charters' Sermons on Alms.

ſider the ſubject, not chronologically downward, but rather under ſuch general heads as may bring under our view the whole practical doctrine of this branch of our law. § 1. GENERAL VIEW AND HISTORY.

§ 2. FUND FOR MAINTAINING THE POOR.

II. THE ordinary collections at the pariſh churches are frequently termed the natural and proper fund for maintaining the poor. It was found in one caſe, that collections at diſſenting meeting-houſes make no part of this parochial fund [a]. Collections.

THIS fund is ſometimes increaſed by the kirk-ſeſſions letting out a hearſe, mortcloth (pall), to hire; by the intereſt of mortified money, or land [b], &c. The kirk-ſeſſion may Mortcloth, &c.

[a] 1739, June 19th, Hill againſt Thomſon. At a faſt, obſerved by a congregation of ſeceders within the pariſh of St. Ninian's, there was collected 51l. Scots; for which the kirk-ſeſſions, as adminiſtrators for the poor, brought an action before the ſheriff, who ordained the defenders to make payment of the money. This decreet the ſeceders brought under review by ſuſpenſion. The court of ſeſſion "ſuſtained the reaſons of "ſuſpenſion." (Clerk, Hume, No. 119.)

In ſome inſtances diſſenting congregations act more juſtly and reaſonably, either by maintaining their own poor, or allowing their collections to make part of the general fund; and thus preventing or diminiſhing the neceſſity of recurring to the leſs agreeable plan of an aſſeſſment, which diſſenters muſt pay as well as others.

[b] From the concurring ſtatements from many pariſhes in ſir John Sinclair's Statiſtical accounts, it would appear that mortifications, when not for ſome *extraordinary* charity, out of the ſphere of legal proviſion, but for relief of the parochial poor, are more commendable for their piety than for their wiſdom or utility. They benefit not the indigent, but the rich; leſs relieve the wants of the aged, diſeaſed, and fatherleſs, than merely diſcharge landlords and others of a tax which the law carefully proportions to the ability of each.

This is not all. The number of poor has been generally found to increaſe in proportion to the extent of ſuch mortifications; not ſo much from their relaxing the induſtry of the native pariſhioners, as by attracting ſtrangers from other quarters.

Even this is not all. The undeniable miſchiefs of proviſions for the poor, in the way of mortification, are frequently, without diſcrimination, employed as arguments againſt all legal proviſions for the poor. But neither evil ariſes from thoſe parochial aſſeſſments, which the wiſdom of the Scottiſh law makes to depend yearly for its increaſe, or diminution, or continuance, upon the diſcretion of the heritors, miniſter, and elders, on a judicial and public examination of circumſtances. Thus, improper claims

§ 2. FUND FOR MAINTAINING THE POOR.

acquire, by *uſe and wont*, the excluſive privilege of letting out the hearſe, mortcloth, &c. for hire within the pariſh. If they have immemorially been in the practice, and ſtill are able, to accommodate the public, nobody can compete with them; neither corporations, nor the ſeſſions of diſſenting congregations [a].

BUT only immemorial uſage can give the kirk-ſeſſion this excluſive right, or intitle it either to prevent individuals from letting out hearſes and mortcloths for hire; or, ſtill leſs

are rejected and prevented; and no unfair influx can burden any one pariſh, when the ſame arrangement is common to all.

[a] 10th Auguſt, 1756, Mr. Andrew Turnbull, miniſter, and the kirk-ſeſſion, of Keppan, againſt John Macclaws and others.

The kirk-ſeſſion of Keppan, a landward pariſh, had been in uſe, from time to time immemorial, of keeping and letting for hire, mortcloths for the funerals of perſons dying in the pariſh, and of applying the money for the uſe of the poor.

A congregation of the ſeceders, within the bounds of this pariſh, bought mortcloths, and let them out to hire among thoſe of their own perſuaſion.

The kirk-ſeſſion brought a proceſs of damages againſt them for uſing thoſe mortcloths, and thereby diminiſhing the produce of the mortcloths of the kirk-ſeſſion.

The court of ſeſſion found, "that "the kirk-ſeſſion have the ſole right "of keeping, and letting for hire, "for the uſe of the poor, mortcloths "within the bounds of the pariſh; "and that the defenders have no "right to keep mortcloths, and give "the ſame out to hire, or even to "lend the ſame gratuitouſly for bury-"ing any of the dead within the "ſaid pariſh, with certification that "they ſhall be accountable to the "kirk-ſeſſion for the ordinary dues "of their mortcloths in the like "caſes."

In a caſe in 1718 betwixt the kirk-ſeſſion and the trades of Kilwinning, the court had found, "that the kirk-"ſeſſion of Kilwinning had the ſole "power of lending out of mort-"cloths, upon hire, for the benefit of "the poor; and that the poor of "the ſaid pariſh have right to the "money ariſing from lending of "mortcloths upon hire within the "ſaid pariſh; and ſicklike that the "kirk-ſeſſion there hath the ſole "right to adminiſtrate the ſame, "but prejudice to private perſons, to "make uſe of their own mortcloths "belonging to themſelves, and de-"cerned the defenders to forbear "uſing mortcloths of their own, or "lending out the ſame for money, "or otherwiſe, to others through "the ſaid pariſh, or any part thereof "in time coming, but prejudice al-"ways to private perſons to make "uſe of their own mortcloths be-"longing to themſelves as ſaid is." (Fac. Deciſ. vol. i, no. 215.)

indeed, to interrupt the ancient uſage enjoyed by any corporation, or other body of men [a]. §2. FUND, &c.

ON immemorial uſage, in like manner, depends the kirk-ſeſſion's title to exact fees at marriages and baptiſms; for kirk-ſeſſions have no power to impoſe taxes [b]. —FEES, OR MARRIAGES, &c.

[a] 18th February 1783, kirk-ſeſſion of Dumfries againſt the incorporation of ſquaremen there.

In Dumfries, the incorporation of ſquaremen had been in uſe, from a very remote period, to let out mortcloths for hire. In 1781, the kirk-ſeſſion inſtituted an action for having it found that they had the ſole and excluſive right of doing ſo. In ſupport of this action, they referred to the following deciſions, 10th Auguſt 1756, Turnbull and kirk-ſeſſion of Keppan againſt M'Claws; Fac. coll. and kirk-ſeſſion of Kilwinning againſt trades, ibid. cit.

Obſerved on the bench. The right which the kirk-ſeſſions in Scotland enjoy of letting out mortcloths for hire, when followed with immemorial poſſeſſion, has been found to eſtabliſh an excluſive right to the emoluments ariſing from this ſort of traffic. Here, however, the defenders having been beyond the years of preſcription in the practice of lending out mortcloths, there is no foundation for the preſent action.

The court of ſeſſion "aſſoilzied "the defenders, in reſpect of the "long poſſeſſion had by them."

[b] 16th June 1765, Beveredge, precentor, and the kirk-ſeſſion of Dunfermline, againſt Francis Bayne and others.

"The kirk-ſeſſion of Dunfermline, by an act, 23d January 1681, "ordained, that whoever, in that "pariſh, ſhould give up their names "to be proclaimed for marriage, "ſhould give half dollar to the poor "before their proclamation." This act was renewed, 8th November 1719. "Upon the narrative, that the cuſ-"tom of paying the ſaid ſum was "much worn out." The purſuer, authoriſed by the kirk-ſeſſion, brought an action before the ſheriff againſt the defenders, all diſſenters of different denominations, and moſtly ſeceders, for payment of this ſum, founding his claim upon the acts of the kirk-ſeſſion, and uſe of payment. As to the laſt, the ſheriff allowed a proof to both parties. The purſuer limited his to the period from 1718 to 1738, i. e. from the date of the laſt act of the kirk-ſeſſion to the ſeceſſion. It appeared from the proof, that the uſe of payment had been pretty general, though not univerſal; that the kirk-ſeſſion, on account of the reluctance of the pariſhioners, had reſolved to accept what they would voluntarily give; that numbers had paid leſs than the half dollar, and many, though people of ſubſtance, had paid nothing.

The ſheriff gave judgment for the purſuers. The cauſe was brought under review by advocation; and, after a hearing, taken to report.

§ 2. FUND —FEES, OR MARRIAGES, &c.

KIRK-SESSIONS, however, being a part of the eccleſiaſtical government, expreſsly authoriſed by law, are intitled to appoint proper officers; and, in order to defray that expence, have power to ordain ſuch fees and perquiſites to be paid, as the circumſtances of the pariſhes may reſpectively require [a].

A permanent fund reprobated by the Scottiſh poor laws.

BUT the "needful ſuſtentation" of the poor is not intruſted ſolely to thoſe ſcanty and precarious ſupplies. When they prove inſufficient to enable the poor, in the language of our ſtatutes, to "live unbeggand," the law directs the deficiency to be ſupplied by an aſſeſſment on the pariſh; it being the leading principle of the Scottiſh poor laws to avoid any fixed or permanent tax, which might increaſe the number of the poor, by affording an encouragement to idleneſs, improvidence, and diſſipation. No aſſeſſment is to be impoſed, till, on due inquiry, it appears neceſſary to meet the exigency of the moment. The law does not direct any *particular* ſum to be annually levied, but only *meetings, from time to time*, to be held, in order to "take inquiſition of all aged, "poor, impotent, and decayed, perſons [b], according to their "number, to conſider what their needful ſuſtentation may "extend to."

Statutes direct only meetings to be held.

THUS the ſtatutes order nothing peremptorily, but "to

The purſuers brought evidence of a deciſion in the year 1746, in a caſe between the kirk-ſeſſion and ſeceders in the pariſh of Falkirk (not reported), wherein ſuch an exaction had been authoriſed.

Anſwered, inter alia, for the defenders. The plea of immemorial uſe is excluded by the act of the kirk-ſeſſion 1719, as well as by the parole evidence. In the caſe of Falkirk, which is but a ſingle deciſion, immemorial uſage was proved.

The court of ſeſſion "ſuſtained the defences." Fac. Coll.

a In the caſe laſt quoted, the libel concluded alſo for certain dues to the kirk-beadles, on occaſion of marriages and baptiſms; which claim alſo was founded upon an act of the kirk-ſeſſion, and immemorial uſage. "The "lords found the beadles intitled to "the dues claimed by them."

In the argument it was ſaid, that in the caſe of Falkirk the ſame point had occurred, and been ſimilarly decided.

b 1579, c. 74.

§ 2. FUND —ASSESSMENT.

"take inquiſition." They neither ſay, *what tax*; nor that *any tax at all* ſhall be levied: they only enjoin inquiry to be made into the circumſtances of the poor; the number and wants of thoſe already upon the liſt; and the pretenſions of thoſe who wiſh to be added to it. If the weekly collection, or other funds, already mentioned, appear adequate to ſupply thoſe intitled to charity, it is neither the direction, nor purpoſe, of the ſtatutes, to aſſeſs the pariſh. And in many places thoſe funds have proved ſufficient to enable the poor to "live unbeggand." So far is a poor tax, when ſound and correct in principle, moderate in extent, and under careful management, from producing that rapid increaſe of the number of the poor, and thoſe other evils ſo much, and, to all appearance, ſo juſtly complained of in England, as the conſequence of their poor rates.

and inquiſition to be made.

Aſſeſſment in many places unneceſſary.

BUT many cauſes have conſpired to prevent the weekly collections, in particular, from keeping pace with the increaſe of the expence of maintaining the poor, to whoſe juſt demands upon the public, thoſe funds are in many pariſhes utterly inadequate.

Diminution of the collection, &c.

THE law, in that caſe, directs the preciſe deficiency, to be aſcertained by inquiring into the ſeveral claims, and making out a liſt of thoſe intitled to parochial aid, in whole or in part; and next directs this deficiency to be provided for by an aſſeſſment on the pariſh. Such a ſum muſt be raiſed as ſeems adequate to the ſupply of thoſe "poor people, "who muſt neceſſarily be ſuſtained by alms."

THIS adjuſting of the liſt of the poor, and fixing of the aſſeſſment, our law, with happy ſelection, has committed to two very reſpectable bodies of men, of all others beſt qualified for the proper diſcharge of ſo important and ſacred a truſt; to the heritors, or landholders, who are liable in one half of the aſſeſſment; and to the kirk-ſeſſion (conſiſting of

§ 2. FUND—ASSESSMENT.

the parochial clergyman and elders), whoſe official ſituations acquaint them with all, and particularly, the moſt needy and afflicted pariſhioners. Thoſe two bodies meet together yearly, half yearly, or oftener, as may beſt ſuit the circumſtances of the pariſh. The meeting is called by public intimation, made in the pariſh church (and in extenſive pariſhes, by advertiſement in the public papers) ten or more free days before.

Who are members of this meeting.

THUS ſtands the law, according to the ſtatutes, as explained by the deciſions of the ſupreme court, and underſtood in practice.

Who aſſeſs?

THESE important powers, now lodged in ſuch ſafe hands, the original act, 1579 [a], had, in the caſe of landward pariſhes, intruſted to judges, to be named by the king. To place the purſe of the lieges at the diſcretion of any officer, in the nomination of the crown, was none of its wiſe or commendable regulations. This error was firſt corrected by the act 1592 [b], which appointed ſuch juſtices "to be named "by the miniſters, elders, and deacons, of every parochin, "or of ſa manie parochines as ſhall concur together." But thoſe juſtices did not exerciſe their office with due attention: wherefore, on the narrative of their negligence and overſight, the act 1600, c. 19 [c], gives their powers to the kirk-ſeſſion, who, if needful, were to be aſſiſted by one or two of the preſbyteries. The preſbyteries were commanded to take trial of the obedience of the ſeſſions thereanent. The general ſtatute, 1661, reſpecting juſtices of peace, ordained thoſe magiſtrates, on the firſt of December, and firſt of June, "to take up" a liſt of the poor of every pariſh within burgh or land, and to appoint overſeers, who were to call for the collections of ſaid pariſh, or other ſums appointed for the maintenance of the poor. Whether

Improvement of the ſyſtem by act 1592.

Farther remedy by 1600, c. 19.

Order made by act 1661.

[a] Appendix I, No. 40.
[b] Ibid, No. 41.
[c] Ibid. No. 43.

juſtices of peace were authoriſed or not, under this act, to aſſeſs the pariſh, certain it is, that this power was by the next ſtatute, 1663, c. 16 [a], far better, and more conſtitutionally, veſted in the heritors, who were themſelves liable in the burden. This ſtatute ſays nothing of elders or kirk-ſeſſions, who had been employed by former ſtatutes in this buſineſs. But the ſtatute 1672, c. 18 [b], again employed that reſpectable body of men, ſo eminently qualified to be the diſpenſers of parochial charity.

§ 2. FUND—ASSESSMENT, BY WHOM?

Farther improvement by 1663, c. 16, and 1672, c. 18.

THIS act put the law upon the footing on which it preſently ſtands. It aſſociates the kirk-ſeſſion with the "heritors, who, and the poſſeſſors of their land, are to bear the "burden of the maintenance of the poor perſons of each "paroch, or *any of them, who ſhall meet with ſaid miniſter "and elders.*" And the firſt proclamation [c], extremely explicit as to the procedure in landward pariſhes, which alone it reſpects, enjoins "the miniſter, heritors, and elders, of every "paroch, to meet, &c.;" and the following year it was ratified and enlarged by the ſecond proclamation [d], which particularly regulated the ſtenting of boroughs, and the caſe "where pariſhes are vacant, and have no elders;" as to both of which, the firſt proclamation had been ſilent.

King William's *firſt* proclamation.

Second proclamation remedied omiſſions in the *firſt*.

WITH reſpect to the laſt caſe, of vacant pariſhes without elders, it enjoins the heritors to meet, "and ſtent themſelves "for the maintenance of their reſpective poor; and to ap-"point the upliſting, ingathering, and applying the ſame, in "the ſame manner as the heritors and elders are appointed "by our ſaid former proclamation."

Vacant pariſhes.

IT need ſcarcely be obſerved, that, under this proclamation, the heritors "were empowered to aſſeſs, not them-

[a] Appendix I, No. 47.
[b] Ibid. No. 48.
[c] Ibid. No. 50.
[d] Ibid. No. 51.

§ 2. FUND—ASSESSMENT, BY WHOM?

"ſelves merely, but the whole pariſh." The firſt proclamation neither ſpeaks of the perſons from whom, nor of the mode, in which the aſſeſſment was to be levied. It muſt, therefore, be ſuppoſed to refer to the law as previouſly ſettled by the acts 1579 and 1663, &c. viz. that one half was to be laid on the heritors, "according to their va-"lued rent, or otherways," and one half on the inhabitants, according to their ſubſtance. In this manner, under the ſecond proclamation, are the heritors to proceed in vacant pariſhes. It provided for a caſe omitted by the former[a].

Third proclamation.

THE third proclamation[b], which had chiefly in view the erection of houſes for the reception of vagrants, alſo gives power and warrant to the miniſter and "elders of each pa-"riſh, with advice of the heritors, *or ſo many of them* as can "concur with the miniſter and elders, upon intimation to "be made from the pulpit upon the Sabbath day before, to "decide and determine all queſtions that may ariſe in the "reſpective pariſhes, in relation to the ordering and diſpoſ-

[a] In the Edinburgh Encyclopædia, v. Poor, *vacant* is ſuppoſed to be ſynonymous with *landwart*; hence an inconſiſtency is imagined and blamed, with which, however, the two proclamations, when underſtood, are not chargeable.

Mr. Eden, in his valuable publication relative to the poor, has taken his account of the Scottiſh poor laws from this article of the Encyclopædia; and thus is betrayed both into this particular miſtake, and to believe that, in Scotland, to uſe the words of the Encyclopædia, there "is no law in force on the ſubject of "a compulſatory aſſeſſment for the "poor." In this miſtake he is further confirmed by the expreſſions of ſome clergymen in their ſtatiſtical accounts, which he quotes. This is ſo far from being true, that a train of deciſions, on different branches of the poor laws down to the laſt ſeſſion, all aſſume the contrary. The caſe quoted in the Encyclopædia, in ſupport of this, is miſapprehended. The party there, an inhabitant of the pariſh of South Leith, refuſed to pay the aſſeſſment, and preſented a bill of ſuſpenſion, both on the general ground of the acts being not in force; and, 2dly, that at any rate the aſſeſſment was erroneous. The bill was paſſed by the lord ordinary, but no diſcuſſion took place. The gentleman's quota was a trifle. The managers did not think it worth while to inſiſt in the action: and thus the court had no opportunity of deciding either on the one point or the other.

[b] Appendix I, No. 52.

"ing of the poor, ſo far as the ſame are not determined by "the acts of parliament, and former acts of our privy coun- "cil, which are ratified by the acts of parliment foreſaid." §2. FUND —ASSESS- MENT, BY WHOM?

UNDER theſe ſtatutes and proclamations, the miniſter, heritors, and elders, are intitled and bound to meet, make up the liſt of poor, and aſſeſs the pariſh for their "needful ſuſ- "tentation." The title of this joint body to appear in queſtions relative to the poor, has frequently had the ſanction of the ſupreme court; judgments have been repeatedly pronounced againſt them, as bound to provide a ſubſiſtence for the poor [a]. Notwithſtanding, therefore, ſome ſeeming variance and diſcrepancy in the enactments, the powers of the meeting conſtituted, as already mentioned, are as much as any other part of our law beyond doubt or controverſy. Reſult of the acts.

THUS has the Scottiſh ſyſtem of poor laws avoided that error ſo fatal in England. The right to inrol the pauper, and modify the allowance, being, in the firſt inſtance at leaſt, veſted in the very perſons who pay the tax, and who can exerciſe thoſe powers only in their public and regular meetings, held after due notice given, and with all advantages for ſcrutiniſing each claim, ample ſecurity is thereby afforded againſt any extravagance of management or miſapplication of the money. Publicly met for the diſcharge of ſo ſerious and important a duty, this reſpectable body of men cannot, on the one hand, be ſuſpected of unduly rejecting perſons truly neceſſitous; ſtill leſs, on the other, are they under any temptation to relax induſtry, and encourage idleneſs, by inrolling perſons of a contrary deſcription; for that would be taking money out of their own pockets. No otherwiſe, then, ſeems this aſſeſſment exceptionable, than any other plan whatever of providing for the poor, whether legal Wiſdom of the law. Precaution againſt extravagant aſſeſſment, or undue management.

[a] 1779, 28th July, heritors and kirk-ſeſſion of Coldingharne againſt heritors and kirk-ſeſſion of Dunſe; 1784, John Runchiman againſt heritors and kirk-ſeſſion of Mordington.

§ 2. FUND—ASSESSMENT, BY WHOM?

or voluntary, temporary or permanent. Charity muſt needs diſpenſe her alms without that rigid ſcrutiny which here occurs. Of all the public funds of Europe, none is managed, it has been often remarked, with ſo little expence to the fund itſelf, none ſo frugally, none ſo impartially, and none laid out more to the purpoſe for which they were raiſed, than the poor's funds under the care of the kirk-ſeſſions of Scotland. "Never, perhaps, will Scotland find a more proper jury to "determine the objects of public charity, nor the *quantum* "neceſſary for their ſupply [a]." This praiſe, it is believed, is in general merited. Even where the heritors diſcharge their duty, by attending the regular meeting for laying on the aſſeſſment, and making up the liſt, ſtill the execution of the buſineſs muſt fall on the ſeſſion; who, for the benefit of the poor, in ſome places, ſubmit to the trouble of making a weekly diſtribution, in place of a monthly. In moſt parts of Scotland, the miniſter "and elders are left by the heri-"tors, ſome of whom are commonly members of the kirk-"ſeſſion, to make the weekly diſtributions to the poor, ac-"cording to their diſcretion [b]."

BESIDES, the advantages of this arrangement are reciprocal. Safe for the public, and conſolatory to the poor, the employing the parochial miniſter and elders in this religious and honourable duty, adds, moreover, to their perſonal conſideration and profeſſional uſefulneſs. It gives weight to their exhortations, popularity to their characters, and favour in the ſight of all men.

The members vote *per capita.*

THE ſtatutes do not ſpecify how the members ſhall vote. It is therefore underſtood that they ſhall vote *per capita*, without regard to the claſs to which they reſpectively belong; that is, each individual, whether miniſter, heritor, or elder, has equally one vote.

[a] Stat. Account, vol. vi, p. 48. [b] Hill's Theological inſtitutes.

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HENCE, moreover, if intimation be duly made, the presence of none of thoſe bodies, in particular, is indiſpenſible to the validity of the meeting. There is no foundation for the contrary opinion, either in the reaſon of the thing, or the ſtatutory language. If the miniſter ſhould not be preſent, there can be no doubt that the heritors and elders; or if the latter alſo were abſent, the heritors, by themſelves, could proceed to buſineſs. There is no reaſon for ſuppoſing the heritors to ſtand in a different predicament. "With the advice of the heritors, or as many as can attend," is the expreſſion uſed in the ſtatutes [a]; and by no means repreſents the actual preſence of the heritors, as more a *fine qua non* than that of the others. If the miniſter has taken the uſual and regular mode of giving intimation from the pulpit, which yet the heritors chuſe to neglect, the meeting, though conſiſting of miniſter and elders only, is poſſeſſed of the whole ſtatutory powers; and is not only authoriſed and bound to adjuſt the liſt, but muſt proceed farther to aſſeſs the pariſh in whatever ſum may appear neceſſary, to enable the neceſſitous poor to "live unbeggand."

Preſence of the heritors not indiſpenſible to the validity of the meeting, if duly advertiſed.

THUS, then, the execution of this excellent proviſion for relief of the poor, depends not upon the heritors alone. The legiſlature's humane and chriſtian intention cannot be fruſtrated, unleſs the miniſter alſo betray the ſacred truſt repoſed in him, and, as well as the elders, concur with the heritors in diſobeying the public law, and neglecting the anxious junctions of ſo many ſucceſſive enactments. This is a wiſe ſecurity. The heritors, when they attend, will always do their duty. But, abſence from the country, ignorance of the ſtate of the poor, and other cauſes, may prevent them from calling meetings, and taking any lead in the buſineſs. This, therefore, is intruſted alſo to the miniſters and elders, whoſe official ſituation affords them the beſt acceſs to know the ſtate of their reſpective pariſhioners.

[a] 1672, c. 18.

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THERE is reaſon to believe, from ſeveral communications in ſir John Sinclair's valuable repertory, that this matter, important though it be, is unhappily miſunderſtood; particularly in the northern parts of the country, where the regular execution of the law is perhaps moſt indiſpenſible. The non-reſidence of the heritors; their omiſſion to ſupply, by donations to the poor, the want of their weekly offering; the inſufficiency of the other funds to enable the poor to live "unbeggand;" and, of courſe, the abſolute neceſſity of permitting them to recur to that miſerable and pernicious mode of life, againſt the expreſs words and general intendment of the ſtatutes: theſe evils the miniſters lament with a warmth and eloquence becoming their ſacred character.

BUT the remedy, as already mentioned, lies with themſelves. And the application of that remedy is not of choice, but neceſſity. *Powers always infer duties.* Public functionaries are clothed with juriſdiction, not for themſelves individually, but for the ſake of the community. If a clergyman tamely ſuffers ſuch injuſtice to be done to his neceſſitous pariſhioners, without taking the regular ſteps to call periodical meetings for making up the liſt of the poor, and aſcertaining and raiſing the ſum neceſſary for enabling them to live "unbeggand," he neglects an important duty committed to him by that conſtitution which eſtabliſhes and ſupports his order.

If the kirk-ſeſſion alſo fail in their duty?

BUT ſhould the miniſter and kirk-ſeſſion, as well as the heritors, neglect this (in our ſtatutory language) "Chriſtian "duty," even this caſe is not without a remedy. The proclamation, 31ſt July, 1694 [a], commands and requires "the "ſheriffs of the ſeveral ſhires, and their deputes, juſtices of "peace, and magiſtrates of royal burghs, within their ſe-"veral juriſdictions, to take trial how far, and in what man-

The remedy lies with juſtices of the peace.

[a] Appendix I, No. 52.

"ner, the ſaid acts of parliament, and proclamations of the "privy council, have been obeyed, and put to execution, "conform to the tenors thereof. And where any have ne- "glected, or been deficient in what is required of them by "the ſaid acts and proclamations, to amerciate and fine "them therefore in manner therein ſpecified and preſcrib- "ed." FUND —ASSESS-MENT, BY WHOM? § 2.

On the idea of a permanent controul being thus veſted in thoſe magiſtrates, the quarter-ſeſſions have more than once interfered in order to obtain a legal aſſeſſment, when that appeared to have been improperly neglected [a].

This meeting, in the firſt inſtance, has the excluſive power of adjuſting the roll, and modifying the allowance [b]. Powers of the meeting.

[a] Stat. Account, vol. vi, p. 477.

[b] November 20, 1772, William Patton, miniſter, and others, concerned in the maintenance of the poor of the pariſh of Eckford, againſt Patrick Adamſon, eggman in Rutherford.

Poor.—Sheriff has no power to fix the quantum of parochial aliment to indigent perſons out of the poor's funds, and paſs decree therefor, in the firſt inſtance.

In an action brought againſt two pariſhes for aliment to an indigent perſon, the ſheriff of the county of Roxburgh having not only determined which of the two pariſhes were liable in the burden, but likewiſe fixed the *quantum* of aliment to be paid by the pariſh burdened, at the rate of ſo much money per week, according as the market price of oatmeal ſhould be at certain prices, and decerned for payment of ſuch aliment out of the poor's fund, a reduction was brought of the laſt part of the ſheriff's decree, as being *ultra vires*.

Pleaded.—The ſheriff did wrong in proceeding to modify a liquid ſum for the aliment. The ſtatutes have not committed this power to any judge, *in the firſt inſtance*, but to the miniſter, elders, and heritors, of the pariſh, by which the indigent perſon is to be alimented; they know beſt whether or not thoſe who apply for the benefit of the public charity be proper objects of it, and what is neceſſary to ſupply their wants: therefore the legiſlature has empowered them to judge who are to be received upon the poor's roll; to impoſe the tax for maintenance of the poor, and to diſtribute that tax according to the neceſſities of the ſeveral indigent perſons who are intitled to ſhare it.

Obſerved on the bench.—The matter of diſtribution *de jure*, as well as from expediency, belongs to the heritors

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But their judgment is not final. If they either refuſe to admit one truly neceſſitous on the roll, or allow him what is utterly inadequate to his ſupport, it is competent to crave redreſs from the courts of law. Seldom, however, is there occaſion (and little, therefore, incline the courts of law) to interfere with this reſpectable meeting in the exerciſe of their diſcretionary powers.

Excluſive, in the firſt inſtance.

If the meeting does wrong, will the courts of law afford redreſs

BUT a remark of Mr. Erſkine, in his ſhort ſection on poor laws, and the practice which ſtill prevails in ſome places of the country, of giving a ſcanty ſupply, which the poor muſt eke out by common begging, make it neceſſary to explain, that the diſcretion intruſted to this meeting is limited to theſe inquiries: firſt, is the claimant a proper object of parochial charity? and, ſecondly, what is ſufficient to maintain him in the manner in which a pauper ought to live? Theſe two points being once aſcertained in favour of the claimant, it is not diſcretionary, but neceſſary, to inrol him, and procure the money.

In what reſpects their power is diſcretionary.

THE practice, therefore, of thoſe pariſhes who are at pains to prevent their poor from begging, is not only politically wiſe and expedient, but agreeable to the object and expreſſion of the legiſlature. For the ſtatute 1579, which was intended as a general code, and ſtill is the leading regulation concerning every deſcription the poor, anxiouſly introduced the *legal aſſeſſment* as a ſubſtitute for *authoriſed begging*; ſcarcely tolerable at a period when the peaſantry were the natural charge of their feudal chiefs, as the poor in general were of the opulent monaſteries.

Aſſeſſment deviſed in place of authoriſed begging.

THIS is plain from the words of that enactment, "to

and kirk-ſeſſion. The ſheriff had no power touching it; and therefore the application, and conſequent decree, as to this particular, fall to be regarded as totally inept and incompetent.

"The lords ſuſtained the reaſons "of reduction; and in reſpect of the "defender's being on the poor's roll, "find no expences due."

§ 2. FUND—ASSESSMENT, BY WHOM?

" inquire the men and women quhair, &c. and quhat they " get commonly on the daye by their begging; and ſik as " neceſſarily mon be ſuſtained be almes, to ſee quhat they " may be maid *content of their awin conſentis to accept daily* " *to live unbeggand*, and to provide quhair their remaining " ſall be be themſelves, or in houſe with others, with ad- " vice of the parochiners quhair the ſaids pure peopil may " be beſt ludged and abyde. And thereupon, according to " the *number, to conſider quhat their neidful ſuſtentation will* " *extend to everie oulk, and then be the gude diſcretions, &c.* " *to taxe and ſtent, &c. to ſik oulkie charge and contribution as* " *ſall be thocht expedient and ſufficient to ſuſteine the ſaidis pure* " *peopil.*"

THIS is not all. According to the ſtatute 1661, the duty of the overſeers is to " take tryal of the good behaviour and " carriage of the poor perſon, liſted and inrolled as afore- " ſaid, that *if any of them ſo provided ſhall go abroad to beg*, " or otherwiſe miſcarry themſelves," &c. they are to be puniſhed. Unleſs, however, by enabling the poor to live without alms, or, in the ſtatutory language, giving them what their " needful ſuſtentation extended to," how could the ſtatute either juſtly puniſh them for begging, or gain its humane and ſalutary purpoſe of enabling them to " live un- " beggand?"

Badges for begging.

BUT, little accuſtomed as the country then had been to any permanent tax, great caution was neceſſary. The ſtatute accordingly concludes with this exception: " *And quhair* " *collecting of money may not be had, and that it is over great* " *ane burden to the collectours to gadder victuals, meet, drink,* " *and ather things for reliefe of the pure in ſome parochines to* " *landwart:* that the provoſt and baillies in burrows, and " the ſaid judges in parochines to landwart, be advice of " certaine of the maiſt honeſt parochiners, give licence un- " der their hand writs to ſik and ſa many of the ſaidis pure

Import of that act.

§ 2. FUND —ASSESSMENT, BY WHOM?

" people, or ſik uthers of them as they ſall think gude to " aſk and gadder the charitable alms of the parochiners at " their awin houſes, ſa as always it be ſpeedily appointed " and agried how the pure of that parochin ſall be ſuſtein- " ed within the ſame, and not be chargeable to uthers, nor " troubleſome to ſtrangers." No pariſh, then, where money may be had, can plead this exemption, or juſtify the raiſing by aſſeſſment a leſs ſum than is neceſſary for maintaining their poor without begging.

ACCORDINGLY, the idea of the ſtatute 1579, to prevent begging by parochial aſſeſſment, is ſteadily purſued throughout all the ſubſequent acts and proclamations. The proclamation 1692, in particular, ordains them " to make up " the liſt of the poor within the pariſh, and caſt up the " quota of *what may entertain them according to their reſpec-* " *tive needs.*"

Work and correction houſes thought of.

AMID this courſe of enlightened legiſlation, there appears an attempt in the third ſeſſion of the ſecond parliament of Charles II, to divert the parochial aſſeſſment to the maintenance of work and correction houſes, which were to be erected over the kingdom. The poor, who could not be admitted into thoſe houſes, being thus deprived of their uſual proviſion, the ſtatute allowed them to ſupply the deficiency by begging. It provides [a], that if the " ſame (contributions at " the paroch kirk) be not ſufficient to entertain them, that

With badges or tickets

" they give them a *badge or ticket to aſk almes at the dwell-* " *ing-houſes of the inhabitants of their own paroch only, without* " *the bounds whereof they are not to beg;* and that they do not " at all reſort to kirks, mercats, or any other places where " there are meetings at marriages, baptiſmes, burials, or up- " on any other publick occaſion."

[a] Appendix I. No. 48.

§ 2. FUND —ASSESSMENT, QUANTUM.

But this attempt to revive licenced begging, which the wife policy of the parliament 1579 had anxiouſly exploded, was merely *acceſſary* to the other regulations of this ſtatute; all which, alſo, fortunately proved abortive: the work-houſes never were erected; the parochial funds were not ſo miſapplied; and we thus providentially eſcaped what in time, like the Engliſh poor rates, might have grievouſly burdened one part of the community, without proportionally benefiting the other.

This ſtatute, then, which is not only obſolete, but never at all appears to have taken effect, affords no countenance or apology to thoſe managers and kirk-ſeſſions who, againſt the general ſcope of our poor laws, and the particular direction of the ſtatutes already mentioned, ſtill continue to give the parochial poor badges as a title to beg, inſtead of ſupplying the deficiency of the other funds by a parochial aſſeſſment.

Mode of aſſeſſing. A&t 1579, c. 74.

In order to raiſe the ſum neceſſary for the enſuing year, or half year, the ſtatute James VI, parl. 6, 1579, c. 74, ordains "to tax and ſtent the hail inhabitants within the parochin, according to the eſtimation of their ſubſtance, without exception of perſones."

Precaution to prevent iniquity in the heritors

In the caſe of landwart pariſhes, the power of aſſeſſing, was (as we have ſeen) intruſted to the heritors and kirk-ſeſſion, who are themſelves liable in the tax. Some precaution, therefore became neceſſary to prevent them from doing injuſtice to the tenants and other pariſhioners, who are not conſtituent members of the meeting. The danger to be guarded againſt was, the heritors relieving themſelves of their proper ſhare of the burden, by laying too much on the other pariſhioners. In order to prevent any poſſibility of this, the ſtatute 1663, c. 16[a], fixes the proportion between the two

[a] Appendix I, p. cxxxii.

§ 3. FUND —ASSESSMENT, HOW.

claſſes of pariſhioners, making one half payable by the heritors, and one half by the *tenants* and *poſſeſſors*, or (as the proclamation 1692, terms them) *houſeholders*; all which are various modes of expreſſing what the ſtatute 1579 means by the "haill inhabitants within the parochin," excluſive of the heritors.

Heritors, how they pay.

THE heritors are aſſeſſed, either "conform to the old extent of their lands within the paroch, conform to the valuation by which they laſt payed aſſeſſment: or *otherways* as the major part of the meeting ſhall agree; liferenters and wadſetters always, during their rights, paying as heritors [a].

Valued uſually the rule,

AGREEABLY to this ſuggeſtion, the rule, wherever it can be adopted without manifeſt impropriety, is the valued rent.

or otherways.

BUT, under the words, "or otherways," it is diſcretionary to aſſeſs by the real rent where that appears more conducive to the great end in view,—equality [b]. When the aſſeſs

[a] Appendix I, p. cxxxii.

[b] January 19, 1773, James Scott, collector of the aſſeſſments of Weſtkirk pariſh, and the heritors and ſeſſion thereof, his conſtituents, againſt John Fraſer, wright in Cabbagehall, in that pariſh.

Poor.—Power of heritors ſuſtained to lay on an aſſeſſment for maintenance of the poor by the real rent, although formerly levied according to the valued rent, as being an expedient alteration from the particular ſituation of the pariſh.

A charity work-houſe, built at the expence of the heritors and pariſhioners of Weſt kirk, was opened in the year 1762.

The pariſh funds being found inſufficient to defray the whole expence of the houſe, the deficiency was made up by an aſſeſſment, which was at firſt laid on in proportion to the valued rent one half to be paid by the heritors, and the other by their tenants.

At a meeting of the heritors, miniſters, and elders, upon 24th July 1769, they aſſeſſed the inhabitants for the maintenance of the work-houſe, for one year, in twopence per pound ſterling of real rent, both of lands and houſes, one half to be paid by the heritor, and the other half by the tenant. This mode of aſſeſſment was afterwards agreed to be continued.

Fraſer, and ſome others, proving refractory, and refuſing payment of their quota, agreeable to this mode, an action was brought by the collec-

ment is laid on by the real rent, the proprietors ſhould be allowed deduction for repairs [a]. It is the landlord who gets the deduction [b]. § 2. FUND—ASSESSMENT, HOW?

ter againſt Fraſer, and other two heritors, for payment of the proportion impoſed on them, and for having it found and declared that the heritors of this pariſh are authoriſed to lay on this aſſeſſment.

Pleaded, in ſupport of this laſt objection: the law adopts the valued rent as the rule in impoſing all ſorts of taxes and parochial burdens, as well as in regulating every parochial queſtion. If it gives riſe to inequality, it may be reaſonable that it ſhould be corrected by the proper authority, which is that of the legiſlature, who will take care, in remedying the abuſe, to fix certain rules, that will do juſtice to all.

Anſwered. In the pariſh of Weſt kirk, the houſes have of late greatly increaſed, and are ſtill increaſing; ſo that the rents of the houſes are nearly three times more than the rents of the lands; whereas the valued rent of the lands is near ten times more than the valued rent of the ground of the houſes which is valued; of that, if this rent was to be the rule, the rural tenants would pay near forty times more, in proportion, than the others, though theſe laſt furniſh almoſt the whole poor. It is believed, that in no pariſh in Scotland where a town makes the principal part of the pariſh, the valued rent is admitted as the rule of aſſeſſment; for, in this caſe, (*however well it may anſwer in pariſhes purely rural*), it would be very oppreſſive upon the country heritors, and their tenants.

Obſerved on the bench.—The proclamations of the privy council are undoubtedly part of our law in this matter; and in them there is no limitation as to the mode of laying on aſſeſſments for maintenance of the poor. Where the valued rent can, it ought to be followed as the rule. This is a new caſe, where it would be unconſcionable and unequal to lay it on by valuation; and the diſcretionary power, which heritor, have by theſe acts of privy councils was properly exerciſed here *ex neceſſitate*.

"The lords adhered to the lord "ordinary's interlocutor," which found the heritors at liberty to levy the aſſeſſment upon the real, and not upon the valued, rent in the pariſh, upon two ſeveral reclaiming petitions and anſwers.

N. B. The purſuer, in his anſwer to the laſt petition, joined iſſue with the defender's requeſt to the court, at any rate, to lay down regulations for fixing the time of holding meetings that ſhall have power to make aſſeſſments, and other particulars; but the court waved their interpoſition, which, it was obſerved, had been refuſed in other caſes: and that if they chanced to differ among themſelves, it would be more proper to reſort to the judge ordinary in the firſt inſtance.

[a] In the above caſe of St. Cuthberts, that arrangement which obtained the ſanction of the court, was one fourth for repairs.

[b] Thus, ſuppoſe the aſſeſſment 6d. in the pound of real rent, a houſe of

§ 3. FUND —ASSESSMENT, HOW? What heritage pays.

IN like manner, it is not merely heritable property paying ceſs to government that is rateable. The diſcretionary powers beſtowed on the general meeting by the ſtatute 1663, are ſufficiently broad to apply to coal-works, mills, manufacturing eſtabliſhments, and other ſubjects which yield a revenue to the proprietor or undertaker.

As in the caſe of houſes, ſo, in rating mills, &c. an allowance ought to be made for repairs, or, which is the ſame thing, a free rental ought to be taken, after deducting ſuch allowance; and ſometimes it is neceſſary to fix a ſuppoſitious rental, in the caſe of ſubjects, which yield an annual profit, though not, properly ſpeaking, a tack duty; and ſometimes the poor's rate has been levied upon the valued rent as to the general body of the heritors, and upon the real rent, or ſuppoſed annual value upon ſubjects, which cannot be rated according to the valued rent; and when the caſe happens to be thus of a complicated nature, difficulties may occur; yet the diſcretionary powers of the heritors and ſeſſion have been ſuſtained in ſuch inſtances, when exerciſed in a fair and equitable manner, and agreeably to the general ſpirit of the law.

THUS in the caſe of Invereſk, 28th May 1794, the rate impoſed was partly on the valued rent and partly on the real rent, and even upon a fictitious or conjectural rent, as to ſome of the ſubjects, ſuch as collieries [a].

20l. ſterling would pay
Proprietor, deducting 1-4th for repairs, - - - 3s. 9d.
Tenant, - - - 5s.
8s. 9d.

But if the proprietor poſſeſſes the houſe himſelf, then he pays only on a rent of 15l. or 7s. 6d.

[a] May 28, 1794, the collector of the poor's rates in the pariſh of Invereſk, againſt the magiſtrates of Muſſelburgh and ſir Archibald Hope. Poor.—Proprietors of mills, and of coal and ſalt works, are liable to be aſſeſſed for the maintenance of the poor.
The heritors and kirk-ſeſſion of the

§ 3. FUND —ASSESS-MENT, HOW?

In boroughs, where the power of aſſeſſing ſtill remains veſted in the magiſtrates, there was not the ſame reaſon for dividing the quota in certain proportions between the pro-

pariſh of Inverеſk, ſome years ago, impoſed an aſſeſſment for the maintenance of the poor. The magiſtrates of Muſſelburgh, who have mills within the pariſh, which they let in leaſe, and ſir Archibald Hope, the proprietor of extenſive coal and ſalt works, alſo within the pariſh, refuſed to pay any part of the poor's rate for theſe ſubjects.

The collector, appointed to levy it, brought an action, concluding againſt them for a proportion of the aſſeſſment, correſponding to the yearly rent or value of theſe reſpective ſubjects.

The lord ordinary reported the cauſe on informations.

Obſerved on the bench.—The diſcretionary powers veſted in the heritors by the ſtatute 1663, are ſufficiently broad to reach coal-works, and the other ſubjects under conſideration; and as all of them add greatly to the number of poor, it is reaſonable that they ſhould contribute to their maintenance. In rating mills, however, a conſiderable deduction ſhould be made from the rent for repairs.

The court unanimouſly pronounced the following judgment: "Find, "that the coal-works, ſalt-works, "and mills, in queſtion, are liable to "be aſſeſſed for the maintenance of "the poor; remit to the lord ordin-"ary to proceed accordingly, to hear "parties further upon the mode or "rate of aſſeſſment, and the parti-"cular circumſtances of each caſe, "and to do as he ſhall ſee juſt."

Thus far the deciſion, as reported in the Faculty collection, goes; the ſequel of it, as appearing from the record, is as follows.

It was repreſented to lord Craig, ordinary, to whom the cauſe had been remitted, that the ſum of 215l. would be neceſſary to maintain the poor of the pariſh for that year; that the heritors and ſeſſion had agreed that 5l. Scots ſhould be levied from the 100l. Scots of valued rent from the heritors; that 40l. ſterling ſhould, as uſual, be paid out of the collections at the church doors; and with reſpect to the town of Muſſelburgh, and other towns and villages in the pariſh, poſſeſſed of lands, mills, and other ſubjects, yielding revenue, that 4d. on each 1l. ſterling might be conſidered as a fair and juſt proportion to be laid upon ſuch ſubjects.

Upon adviſing a condeſcendence, with anſwers, replies, and duplies, his lordſhip pronounced the following interlocutor: "Finds, that the "mills, coal, and ſalt, works, be-"longing to the town of Muſſel-"burgh, and to the heirs of the late "ſir Archibald Hope, lying within "the pariſh of Inverеſk, fall to be aſ-"ſeſſed as follows, viz. the mills of "Muſſelburgh at the rate of 4d. per "pound of the ſtipulated rent, as "ſettled and aſcertained by the tacks "thereof at the time; finds, with

§ 3. FUND—ASSESSMENT, HOW?

prietors and tenants. Under the original ſtatute, 1579[a], the hail inhabitants are to be aſſeſſed "according to the eſtimation of their ſubſtance, without exception of perſons."

According to the ſubſtance of each,

A ſubſequent ſtatute, 1597, c. 279[b], on the narrative "of their being diverſe inhabitants that dwells within the free burrows with their families, and are of reaſonable ſubſtance, as alſwa hes rents and livings within the ſamin burgh, zit refuſis to contribute for the entertainment of the puir, watching and warding within the burgh, with the reſt of the nichtboures, or to bear their part of ſik uther dewties as concerns his majeſties ſervice, ſtatutes and ordains, that all ſik as hes their reſidence and dwelling within the ſaids burrows be their families, and may ſpend one hundreth pounds of zeirly rent within the ſame, or ſtented be the diſcretion of the neichtboures to be worth twa thouſand marks in free guades, ſall be ſubject to be burdened with the reſt of the inhabitants."

thoſe ſpending 100l. of yearly rent,

or 2000 merks.

WHO are included in the deſcription of *inhabitants*, has ſometimes been the ſubject of controverſy.

Inhabitants, who?

THE aſſeſſment, in particular, was found payable by the

" regard to the coal-works, that every open or working pit, either in the reſpondent's own hands, or in thoſe held under leaſe, muſt be preſumed to yield a profit or rent of 50l annually, and conſequently finds that theſe fall likewiſe to be aſſeſſed at the ſame rate and proportion of 4d. per pound of rent, valuing each pit ſo open and working at ſaid ſum of 50l.; and as to the ſalt-works, eſtimates them at a rent of 40l. ſterling a-year; and finds that the ſame muſt in like manner be aſſeſſed at the aforeſaid rate of 4d. per pound of the rent, therefore finds that the ſaid ſeveral ſubjects, or properties, are to be burdened or aſſeſſed on the above principles annually in all time coming, for the ſupport and maintenance of the poor of Inverneſk, and decerns and declares accordingly."

A ſhort repreſentation againſt the above interlocutor was preferred for the truſtees of ſir Archibald Hope, which was refuſed without anſwers; and then the judgment pronounced appears to have become final.

[a] Appendix I, No. 40.

[b] Ibid. No. 42.

partner of a mercantile concern within the borough; where he neither reſided nor kept ſervants, or any family eſtabliſhment, but only had a furniſhed houſe for his occaſional accommodation when he came there to do buſineſs [a]. § 2. FUND—ASSESSMENT, HOW?

No preciſe mode is ſpecified by the ſtatute for aſcertaining the ſubſtance of individuals. Various modes have therefore been adopted in the different royal boroughs. In Edinburgh the houſe-rent has been adopted as the rule of aſſeſſment. In Glaſgow the tax is levied according to what is ſuppoſed to be the fortune or wealth of individuals, excluſive of heritable property without the borough; ſo that the magiſtrates aſſeſs them according to their heritable property within the borough, and their perſonal funds, wherever ſituated. In one caſe, where this laſt method was objected to as arbitrary and oppreſſive, the court did not find it illegal; although, in general, they ſeemed to think "the rule "adopted in Edinburgh, of making every perſon pay ac- "cording to the rent of the houſe which he inhabits prefer- "able, as affording a *datum* ſufficiently accurate, and in no "caſe liable to partiality [b]." Subſtance how aſcertained in burghs.

[a] 1798, collector of Glaſgow poor rates againſt Andrew Buchanan of Arcoonel.

[b] December 2, 1797, Thomas Laurie, collector of the poor's rates for the city of Glaſgow, againſt Robert Dreghorn.

"In Glaſgow, a committee from "the town-council, and from the "merchants and trades-houſes, have, "by immemorial cuſtom, been an- "nually appointed by theſe bodies "for ſuperintending the maintenance "of the poor. The firſt ſtep taken by "the committee, is to make an eſti- "mate of the ſum neceſſary for this "purpoſe during the year of their "management. They afterwards "appoint a certain number of the "inhabitants (commonly fifteen), "who are neither members of the "town-council, nor of the commit- "tee for the poor, as aſſeſſors, to "proportion it, upon oath, among "the inhabitants at large, according "to the beſt judgment they can "form of their fortunes, excluſive of "heritable property ſituated without "the town.

"Mr. Dreghorn refuſed to pay "his aſſeſſment, contending, that "poor's rates can only be levied on

§ 3. IND OLEAN- IG.

ANOTHER fund ſaid to belong to the poor, is, the privilege of gleaning. In England this practice ſeems to have obtained, as well as in this country: for "it hath been ſaid, "that by the common law and cuſtom of England, the poor

"ſtock in trade and heritable pro-"perty within the town."

In an action brought againſt him before the magiſtrates in name of the collector of the poor's rates for his full aſſeſſment, they found, "that the "magiſtrates and council of Glaſgow, "by whoſe authority the aſſeſſment "in queſtion has been aſcertained, "by means of ſworn aſſeſſors ap-"pointed by them, for aſcertaining "each inhabitant of the city's pro-"portion, according to his eſtimated "wealth, of this neceſſary public "burden for the maintenance of the "city's poor, have title, by expreſs "ſtatutes, to aſcertain and levy the "due proportions of ſuch aſſeſſ-"ments; and in reſpect of ſaid aſ-"ſeſſors apportionment of the ſum "of 19l. on the defender Mr. Dreg-"horn; and, *ſeparatim*, as Mr. Dreg-"horn has not denied that the ex-"tent of his fortune locally within "the city, and of his perſonal eſtate "wherever ſituated, which are the "legal meaſures of ſuch public bur-"dens, which laſt is not ſubject to "ſuch a burden without the city, are "adequate to ſuſtain his proportion "of the ſaid aſſeſſment, according "to the ſame proportion impoſed on "the like eſtates of the other inha-"bitants, repelled the defences, and "decerned for the ſums libelled."

The defender brought this judgment under review by advocation; and, *pleaded, inter alia*, there is an evident expediency in confining the application of the burden in this manner. The aſſeſſors may aſcertain with tolerable preciſion the value of the heritable property and ſtock in trade, belonging to each individual within burgh; but when they attempt to fix the amount of a man's whole perſonal property, their computations muſt neceſſarily be liable to much uncertainty; an evil which can only be removed by a full diſcloſure of a man's affairs, rather than make which, many mercantile people would ſubmit to great oppreſſion.

Anſwered. The alleged inexpediency of this mode of aſſeſſment, if at all well founded, applies more ſtrongly to taxing mercantile ſtock, than perſonal fortune not employed in trade. A perſon, though engaged in great commercial concerns, may be worth nothing; but the extent of a man's fortune, when realiſed, is commonly pretty well known to his fellow-citizens. The danger of diſcloſing his affairs, too, is incomparably greater to the one than the other. Suppoſing, however, there were objections to this mode of taxation, it is ſurely better than allowing perſons, like the defender, with large perſonal fortunes not employed in trade, to be almoſt wholly exempted from paying any ſhare of the poor's rates.

The lord ordinary "remitted the "cauſe to the magiſtrates, and found "the defender liable in expences."

The lords unanimouſly adhered.

" are allowed to enter and glean upon another's ground, after " harveſt, without being guilty of treſpaſs; which humane pro- " viſion ſeems borrowed from the Moſaical law [a]." But the court of ſeſſion, when that practice came under judicial diſcuſſion, pronounced a judgment againſt its legality. A field, where the farmer and his ſervants were buſied in binding ſheaves and loading carts with them, was entered by ſome people, men, women, and children, for the purpoſe of gleaning, or *gathering*. The farmer ordered them away, alleging they might pilfer as well as glean. They inſiſted on their right. A ſcuffle enſued. One woman, who was hurt, proſecuted the farmer for damages. He brought a counter action againſt her and the others for invading his property. The ſheriff allowed a proof; and afterwards diſmiſſed the woman's complaint; and fined ſome of the defenders in 10s. to the fiſcal, and the ſame to the farmer; and ordained three of the defenders to be impriſoned for ſix days. The lord ordinary reverſed this judgment: but the court altered the judgment of the ordinary; and, " it is informed, went on the " general principle, that the poor had no right to glean or " gather; and that the practice ought to be diſcouraged, on " account of the opportunities it affords for pilfering [b]." And, notwithſtanding the above obſervation of judge Blackſtone, the court of common pleas, in the time of lord Loughborough, pronounced a ſimilar judgment [c].

§ 2. FUND —GLEANING.

[a] Black. vol. iii, c. 12.

[b] Maclaurin, p. 744. 1771, John Wilſon.

[c] " Two actions of treſpaſs have " been brought in the common pleas " againſt gleaners, with an intent to " try the general queſtion, viz. whe- " ther ſuch a *right* exiſted. In the " firſt, the *defendant* pleaded, that " he being a poor, neceſſitous, and " indigent perſon, entered the plaint- " iff's cloſe to glean. In the ſecond, " the defendant's plea was, as before, " with the addition, that he was an " inhabitant, legally ſettled within " the pariſh. To the plea, in each " caſe, there was a general demurrer. " Mr. J. Gould delivered a learned " argument in favour of gleaning; " but the other three judges were " clearly of opinion that this claim " had no foundation in law; that

§ 2. FUND — MANAGEMENT OF.

ALL thoſe various funds above mentioned, as well as the parochial aſſeſſment, are under the joint management of the kirk-ſeſſion and heritors, or rather the ordinary adminiſtration and application of the money lies with the kirk-ſeſſion, under the controul of the heritors. So was the law laid down in an interlocutor of the court of ſeſſion [a]; by which this matter has ever ſince been underſtood to be regulated.

Under whoſe management.

Rule laid down in the caſe of Humbie.

IT was as follows: "The lords found, that the heritors "have a joint right and power with the kirk-ſeſſion in "the adminiſtration, management, and diſtribution, of all "and every of the funds belonging to the poor of the pa-"riſh, as well collections as ſums mortified for the uſe of "the poor, and ſtocked out upon intereſt, and have right to "be preſent, and join with the ſeſſion, in their adminiſtra-"tion, diſtribution, and employment, of ſuch ſums, with-"out prejudice to the kirk-ſeſſion to proceed in their ordin-"ary acts of adminiſtration, and application of their collec-"tions to their ordinary and incidental charities, though the "heritors be not preſent nor attend: but for the better pre-"venting the miſapplication, or embezzlement, of the funds "belonging to the poor, they found, that when any acts of "extraordinary adminiſtration, ſuch as uplifting of money "that hath been lent out, or lending, or re-employing the "ſame ſhall incur, the miniſter ought to intimate from the "pulpit a meeting for taking ſuch matter under conſider-

"the only authority to ſupport it "was an extrajudicial dictum of lord "Hales; that it was a practice in-"compatible with the excluſive en-"joyment of property, and was pro-"ductive of vagrancy, and many "miſchievous conſequences." 1 Hen-ry Black. rep. 51. Chriſtian's Blackſt. b. iii, c. 12, p. 212, N. 3.

[a] The heritors of the pariſh of Humbie, againſt the miniſter and kirk-ſeſſion, Feb. 13, 1751; which deciſion was approved of, and its principle followed in the late caſe of Black againſt the miniſter and kirk-ſeſſion of Orwell, 20th December 1803.

" ation, at leaſt ten days before holding of the meeting, that " the heritors may have opportunity to be preſent and aſſiſt, " if they think fit; and declare accordingly." § 2. FUND —MANAGEMENT OF.

ANY of the heritors can call the miniſter and kirk-ſeſſion to account for their management [a]. This appropriation of the funds to purpoſes ſtrictly charitable, muſt, however, be taken under one equitable exception. As every fund is primarily chargeable with the expence of collection and management, ſo, in pariſhes where it has been found neceſſary to appoint a collector for the poor, his ſalary, and in all caſes that of the ſeſſion-clerk, who keeps the books and accounts relative to the poor money, are properly payable out of the firſt end of thoſe funds. This principle was recognised in the caſe of Cambuſlang, where the court " ſuſtained the defence laid out for the purchaſe and after repairs " of the tent, and alſo the articles paid to the ſeſſion-clerk;" while it found, " that the ſalary paid to the preſbytery clerk " *was illegal;* but, in reſpect of the univerſal cuſtom, found " that the defenders are to have allowance thereof in time " paſt, but *not in time coming;* and repelled the defences to " the hail other articles [b]."

[a] 23d Nov. 1752, Hamilton againſt the miniſter and kirk-ſeſſion of Cambuſlang.

The purſuer brought his action as an heritor of this pariſh againſt the miniſter and kirk-ſeſſion for exhibition of the accounts and count-books of the money and funds belonging to the poor of ſaid pariſh; with a concluſion, that in caſe it ſhould appear that the defenders had miſapplied the poor's money to other ends and purpoſes than the law directs, they might be decerned to repeat the ſame to ſuch perſon as the lords ſhould appoint for behoof of the poor. It occurred as a doubt to ſome of the judges, whether this action was competent to one *ſingle heritor* of the pariſh. " The court of ſeſſion " found, that it is competent to one " heritor to bring a proceſs againſt " the kirk-ſeſſion for accounting for " their management of the poor's " money."

[b] Upon production of the accounts, the following articles appeared ſtated to the diſcharge of the poor's money.

1, To a new tent for the field-preachings.

§ 3. OBJECTS OF PAROCHIAL CHARITY.

III. THE perſons intitled to parochial charity, though not particularly enumerated by any ſtatute, are comprehenſively

2, To the expence of repairing ſaid tent from time to time.

3, To cummunion forms, tables, and table-cloths.

4, To rent for a preaching-field.

5, To conſtables and officers for attending to keep the peace at the ſacrament.

6, To damages done to an heritor's dike adjacent to the preaching-field.

7, To the preſbytery and ſeſſion-clerks.

Excepting articles 1, 2, and (ſo far as relates to the ſeſſion-clerk) 7, all the reſt were condemned as miſ-applications of the poor's money. The general principle on which the interlocutor proceeded, ſeems not reconcilable with the particular findings. There was no other public fund for defraying the expences of articles 3, 4, 5, and 6, any more than of articles 1 and 2; one and all of theſe articles were expences incurred through the great crowds, whoſe contributions, however, conſtituted the very fund in queſtion. There appears no better reaſon for making articles 1 and 2, than articles 3, 4, 5, 6, a charge on the collections. So far the interlocutor ſeems not quite conſiſtent.

With reſpect alſo to the diſallowing the expenditure of part of the collections towards paying the ſalary of the preſbytery clerk, doubts, which ſeem entitled to attention, have been entertained of the juſtneſs of the deciſion.

It is the opinion of very reſpectable clergymen, that the caſes of Humbie and Cambuſlang were not ſufficiently conſidered, particularly in ſo far as the act of council 1693 does not appear to have been taken under view, or indeed, it may almoſt be ſaid, pleaded on by the parties concerned. This and the other acts of council and proclamations concerning the poor, were expreſsly ratified by the act of parliament 1695, c. 43; and therefore ought to be conſidered as having the force of legiſlative enactments. The act of council 1693, "for preventing of any queſtion "that may ariſe betwixt the heri-"tors and kirk-ſeſſion about the "quota of the collections at the "church-doors, and otherwiſe to be "made by the ſaid ſeſſion, to be paid "to the heretors for the end fore-"ſaid, ordains the ſame to be the "half of the ſaid collections, and "ordains the ſaid kirk-ſeſſion to pay "in the ſame from time to time to "the ſaid heretors;" (appendix I, p. cxlvi) which ſeems neceſſarily to ſuppoſe that the other half is to remain with the ſeſſion, to be applied at their diſcretion alone, to certain incidental purpoſes to which it had previouſly been the practice of the kirk-ſeſſions to apply ſome part of the collection. Theſe were private occaſional charities, the ſalaries of beadle, ſeſſion-clerk, preſbytery and ſynod clerks (who exiſted even in times of epiſcopacy), and any other fair object of cuſtomary application, of which no other fund was by law applicable. It is not diſputed, that even as to this part of the fund the ſeſſion

described by the oldeſt enactment touching the poor [a], as "thoſe who may not win their living otherways." In the other ſtatutes, they are termed "poor, aged, lame, and impotent;" and the ſtatute 1579 deſcribes them as "poor, impotent, and decayed, perſons, whilk, of neceſſity, muſt live by alms." § 3. OBJECTS OF PAROCHIAL CHARITY.

Under theſe general expreſſions, the managers of the poor's funds have been in the practice of affording relief to infant children, idiots, or perſons inſane, and other claſſes of poor perſons, who are not expreſsly mentioned in any of the ſtatutes.

As the beſt remedy againſt a numerous liſt of permanent poor, it has always been the practice to aſſiſt perſons who, by misfortune, or diſeaſe, or other circumſtances, are diſabled, for a time, from maintaining their families. And even when the neceſſary relief is not of ſuch extent, or for ſuch a period of time as makes it worth while to place the diſtreſſed individual on the roll, ſtill it is uſual, in practice, to afford ſuch ſupplies as the exigency requires. By means of theſe ſeaſonable ſupplies, many, who would have been irretrievably ruined, or prematurely cut off, leaving their families a permanent burden on the public, are reſtored to the exerciſe of their lawful induſtry; and afterwards, inſtead of needing farther aid, ſometimes thankfully repay the money ſo ſeaſonably advanced to them. But, of this particular charity, farther afterwards. Temporary diſtreſs relieved. Wiſdom of doing ſo.

In like manner, parochial aid is afforded to thoſe who,

may be called to account for embezzlement, or groſs miſapplication.—But ſo may the heritors, if they abuſe their truſt. The late caſe of Orwell did not come to any preciſe determination upon this ſubject, as in general the management of the miniſter and ſeſſion was approved of, and the action diſmiſſed.

[a] 1424, c. 25. Appendix I, p. cix.

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though willing to work, yet, with their utmoſt exertions, cannot earn enough for their ſubſiſtence; as, for example, to widows, left unprovided with large families of young children.

Wiſdom of maintaining theſe better.

INDEED, ſuch families are uſually maintained in a better condition, and kept in a higher claſs of ſociety than thoſe poor who are utterly diſabled from any ſort of labour: that the former may not fall into a ſtate of abſolute poverty, like the latter, but may be in condition to do as much work for themſelves as poſſible, they are fed, clothed, and accommodated, ſo as to keep them on a footing with their fellows, in that labouring and induſtrious claſs of the community to which they belong.

Partial aid.

IN like manner, partial aſſiſtance is afforded to thoſe who, by reaſon of age or infirmities, are not able to earn the full rate of wages uſually given in the place where they live, but are under the neceſſity of working at an inferior rate of wages, inſufficient for their own ſupport, or that of their families [a].

THE above deſcription of perſons, whoſe wants, whether requiring parochial charity, in whole or in part, ariſe from any ſpecial viſitation of affliction to the individual, have been denominated the ordinary poor, to diſtinguiſh them from thoſe who need a temporary ſupply from the public, only in conſequence of the dearth of proviſions, or other extenſive calamity, which preſſes upon a whole claſs or order of inhabitants of the country.

Ordinary poor.

Extraordinary.

THUS, then, under the denomination of ordinary poor,

[a] The utility of this laſt application of parochial charity has not eſcaped the notice of the ſtateſmen of other countries. See Mr. Pitt's ſpeech and bill. Apud Eden's State of the poor, vol. iii, append. No. II.

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there are, we have ſeen, two different claſſes of people intitled to parochial aid: firſt, the poor, properly ſo called, whoſe wants, whether requiring partial or total ſupply, ariſe from a permanent cauſe, and of whom conſiſts the liſt adjuſted at the general meeting of the heritors and elders: ſecondly, thoſe needing occaſional charity, whether ſtrangers in paſſing through the country, or reſidenters, in the predicaments already ſpecified. Such perſons are not conſidered as in the claſs of poor; on the contrary, the virtue and political neceſſity of ſuch occaſional ſupplies, is their tendency to keep ſuch perſons and families from falling into that unfortunate and unprofitable condition. As preventive is, in many reſpects, preferable to vindictive juſtice, ſo is this kind of charity to all other modes of it whatever. The latter prevent that miſchief to the community and to the individual, which is the conſequence of profeſſional begging: but to preventive charity is to be aſcribed all that private happineſs and public benefit which ariſe from keeping ſuch families from falling from that uſeful and reſpectable claſs of citizens who ſupport themſelves by their induſtry.

Great benefit from occaſional ſupplies to perſons not on the roll.

As the heritors were known only when aſſembled at the ſaid meetings, thoſe occaſional charities from time immemorial had fallen to the ſhare of the kirk-ſeſſion; a body always upon the ſpot, and upon whom the active management of the whole buſineſs of the poor chiefly devolves. Aſſuming this to be the fact, the proclamation 1693, as already mentioned, ordains the one half of the collections to be paid over, as part of the fund for the permanent poor; the remainder, of courſe, lying in the hands of the ſeſſion, to be ready at their diſpoſal, in caſe of occaſional demands, according to uſe and wont. At the period of that act, the collections at the church-doors bore a greater proportion to the other funds than at preſent. In pariſhes, therefore, where this proportion of the collections is inſufficient for thoſe occaſional demands, the herit-

Fund for defraying occaſional charities.

One half of the collection by proclamation 1693.

§ 3. OBJECTS OF PAROCHIAL CHARITY.

ors, upon a ſound and liberal conſtruction of the acts, allow the whole collections to be retained for that purpoſe. In like manner, wherever the whole collections are inadequate, it follows, that a part of the fund raiſed by aſſeſſment ought to be lodged with the kirk-ſeſſion for the ſame indiſpenſible purpoſes. For, as much as any other, they are parochial charity, ſanctioned by the law.

Under the controul of the heritors.

BUT, according to the rule laid down in the caſe of Humbie, ſuch funds, though conſiſting merely of the one half of the collections, are, as well as the reſt, under the controul of the heritors, while the management, in the firſt inſtance, is at the diſcretion of the kirk-ſeſſion. Such funds, lying in their hands for occaſional charities, cannot be diverted by them to other purpoſes, how uſeful or public, or meritorious ſoever, if they do not, *bona fide*, come under the deſcription of parochial charity. Agreeably to the above-mentioned deciſion, therefore, the ſeſſion can be called to account by any one of the heritors, to ſhew in what manner ſuch fund has been expended, and will be perſonally liable to replace ſuch part of the money as may have been applied by them to purpoſes not charitable. Becauſe if occaſional charities did not occur ſufficient to exhauſt the whole ſum ſo retained by them, ſuch ſurplus would be poor's money, which, of courſe, would ſo far diminiſh next year's porochial aſſeſſment. As to the queſtion, whether they are at liberty to apply any part of it to the payment of the preſbytery clerk, that depends upon this other queſtion, whether by uſe and wont, or otherwiſe, ſuch be a proper application of poor's money [a]? This at leaſt is clear, that it is not in conſequence of the kirk-ſeſſion poſſeſſing any more diſcretionary power over the half of the collection than over the other funds, that ſuch application of it can be juſtified. Their diſcretion lies in judging, *bona fide*, of the claimants titles as objects *of charity*, not in ſpending the money on other purpoſes than charity.

May be called to account for their expenditure thereof.

If to the ſalary of preſbytery clerk.

[a] See above, p. 52, note.

IV. The poor perſon muſt be maintained by the pariſh either where he was born, or where he has reſided during the requiſite period without parochial aſſiſtance, or public begging. § 4. Pariſh, what liable?

A settlement is obtained in a pariſh by reſiding there for the period of three years. The act 1579 uſes the expreſſion, "ſeven years bypaſt;" as does alſo the proclamation 1693, which is ratified by the ſtatutes 1695, c. 43, and 1698, c. 54. The proclamation, however, cannot be preſumed to be ratified in any ſenſe inconſiſtent with the ſtatute 1672, c. 18, which likewiſe is ratified; but requires no longer reſidence than three years [a]. Three years reſidence without charity.

The three years reſidence muſt immediately precede the

[a] June 6, 1745. Overſeers of the Poor in the pariſh of Dunſe *contra* the Heritors and Inhabitants of the pariſh of Edrom.

One M'Caul, an indigent perſon, born in the pariſh of Edrom, but who for ſix years laſt paſt had reſided in the pariſh of Dunſe, brought an action before the juſtices of the peace of the ſhire of Berwick againſt the miniſter and treaſurer to the kirk-ſeſſion of Edrom, for having an alimentary proviſion ſettled by them upon him and his family; which the juſtices very improperly ſuſtained, and modified half-a-crown a week.

This decree being brought before the lords by ſuſpenſion, and at diſcuſſing thereof, appearance made for the pariſh of Dunſe, the queſtion turned upon theſe points; 1*mo*, whether the place of the perſon's birth, where that is known, ought not to be burdened with his maintenance, whatever time he may have reſided elſewhere; or whether reſidence for a certain period does not intitle to maintenance? and, 2*do*, if it does, whether it be three years or ſeven years reſidence that intitles to it?

The lords found, "That the pariſh "in which perſons indigent, or be- "coming indigent, have reſided dur- "ing the immediate three years pre- "ceding their application for chari- "ty, are bound to ſubſiſt and ali- "ment ſuch indigent and poor per- "ſons; and therefore ſuſpended the "letters." And in regard that the procurator for the charger appeared alſo for the pariſh of Dunſe, in which the charger had reſided upwards of three years, "found the pariſh of "Dunſe liable to ſubſiſt and aliment "him, and decerned the heritors of "the pariſh to meet and ſtent them- "ſelves accordingly." Kilkerran.

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pauper's falling into poverty, and not merely his applic for parochial charity[a].

If the place of his birth be known?

THE ſtatute 1663, c. 16, " which only burdens the " of the perſon's reſidence with his maintenance, in caſ " place of his birth was unknown, reſpects the caſe o " grants and vagabonds alone, who had no fixed reſi " anywhere[b]." It is only when the pauper has not ac ed a ſettlement in any pariſh by reſidence, that he mu maintained by the pariſh where he was born.

—CHILDREN.

CHILDREN being conſidered as part of the family, be maintained by the pariſh which would have been in the maintenance of the father, had he been the c ant.

[a] Runciman againſt pariſh of Mordington; 1784, Jan. 24.

In the pariſh of Mordington, John Runciman had for many years ſupported himſelf as a labourer. He then removed to a neighbouring pariſh. Soon afterwards becoming blind, he lived in the latter pariſh for more than three years upon *private charity*. Thereafter he brought an action againſt the managers of Mordington poor money; who were found liable by the ſheriff. His judgment the pariſh brought under review by ſuſpenſion. Lord Monboddo, ordinary, ſuſpended the letters ſimpliciter, i. e. found the pariſh not liable. " In reſpect it does not appear that the charger's reſidence " was within the pariſh of Mordington for three years immediately " preceding the charge." But the court altered that judgment; finding, " that in reſpect the charger reſided " in the pariſh of Mordington until " a year prior to his blindnes " afterwards acquired no fun " ſubſiſtence, that pariſh was " for his aliment; and foun " letters orderly proceeded."

[b] Kilkerran, p. 406.

[c] Auguſt 7, 1767; Baxter pariſh of Crailing. F. C.

This caſe was decided on an ry into the practice. The court " that John Baxter was intitle " maintained by the pariſh of " burgh, as the pariſh where " reſided during the immediat " years preceding his applicati " charity." And in a ſtill late Waddel againſt the Heritor Kirk-ſeſſion of Hutton, the conſidered the law finally ſettl the above deciſion; and the three years reſidence being p would not liſten to any argu from the birth place being k June 14, 1781. Ibid.

§ 4. WHAT PARISH? —CHILDREN.

oint was firſt decided in a competition between the of Dunſe and Coldinghame. In the former pariſh ren were born in lawful wedlock. Soon after the parents removed to the latter pariſh, where the lived for more than three years in family with n the father's death the mother applied for paroch- owards their maintenance. The court of ſeſſion e latter pariſh liable [a].

The father's ſettlement, if known, is theirs.

deciſion was quoted from the bench with approba- he ſubſequent caſe of a child born in lawful wed- he pariſh of Arbroath. Some days after the birth nts removed to the pariſh of St. Vigeans. Two ter, on the mother's death, it was removed by its uncle to the pariſh of Alyth. The father, after re- wards of three years in the pariſh of St. Vigeans, oad. On the uncle's death, the child becoming deſ- e queſtion occurred, which of the three pariſhes was maintain it? The court of ſeſſion pronounced judg- inſt the pariſh of St. Vigeans, where the father had l a ſettlement [b].

If the child never was there?

e above caſe, the rule was laid down by the bench nerally. The place of the father's ſettlement, there- ſt be equally liable to maintain even thoſe children ther were born, nor ever reſided there [c].

July 1779. F. C. January, 1800; Anne Cuth-

no doubt true, that a dif- ſion was once pronounced. ſon acquired a ſettlement ſh of Bowden. Thereaf- ved to Melroſe; where a born to him. Within three ent to reſide in the pariſh of Stitchel, where another child was born to him. He died ſhortly after. According to the rule laid down in the text, the pariſh of Bowden ſhould have been liable in the childrens aliment; wherein, however, the court of ſeſſion ſubjected the other two pariſhes reſpectively. (Pariſhes of Melroſe and Stitchel againſt Pariſh of Bowden, 24th January 1786.) But

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THE point has long been ſettled in England: "It was "ruled by all the court of common pleas, upon argument, "that where the father gains a ſecond ſettlement after the "birth of his child, that ſettlement is immediately commu- "nicated to the child; and a child may be ſent to the place "of his father's ſettlement, *without ever having been there* "*before* [a]."

If the father be dead?

"THE death of the father does not alter the child's ſet- "tlement [b]." So, moreover, "if the father dies before the "child is born, yet the child ſhall be ſettled where the fa- "ther was ſettled before his death [c]."

THE rule, therefore, is, that the child's ſettlement follows that of its father, if the latter can be found; and that no recourſe ſhall be had to the mother's ſettlement till that of the father can be traced no further [d].

even at that time, when the rule was not ſo well underſtood, the caſe was thought to be attended with much difficulty; and were it again to occur, there ſeems to be no reaſon to doubt that it would be differently decided.

[a] H. 10, G. St. Giles', Reading and Everſley, Blackwater. 2 Seſſ. c. 112, Str. 580. L. Raym. 1332. Burn (Poor, iii, 4.)

And in a queſtion, "whether the "children, being above the age of "nurture, ſhall be removed with the "father to the father's ſettlement, "where the child had never inhabit- "ed?" it was obſerved by lord chief-juſtice Lee: "In the caſe of "Everſley Blackwater, the court "were of opinion that a child might "be ſent to the ſettlement of his fa- "ther, though it never had been there "before, contrary to an opinion of "lord Parker, in a former caſe; and, "he ſaid, the true diſtinction, I "think, is, that when children have "gained no ſettlement, but continue "part of their father's family, they "ſhall follow their father's ſettle- "ment." (M. 12, G. 2. Sowton and Sydbury. 2 ſeſſ. c. 150. And. 345. Burn, ibid.)

[b] So ruled by lord-chief-juſtice Holt, in the caſe of Howel and his wife, who were ſettled at Lucking- ton, and came to St. Auſtin's, when a child was born. The father died in the king's ſervice. The queſtion was, who ſhall keep the child? It was objected that it was ſettled where born; for that they could not ſend it to the father, when he was dead. Comt. 380.

[c] M. 5. An. Q. and Clifton. Vine, 382. Burn, ibid.

[d] Burn, ibid. p. 430.

§ 4. WHAT PARISH? —CHILDREN.

But if the father's ſettlement cannot be found, or if he has no ſettlement, being a foreigner, and not having reſided the requiſite period in any pariſh, the child, in that caſe, has the benefit of its mother's ſettlement: her right deſcends to the children; and they are not to be ſent to the place of their birth [a].

When it has the benefit of the mother's?

In like manner, if, after the huſband's death, the widow, by reſidence, acquires a ſettlement, the benefit thereof is communicated to her children [b], even preferably to that of their deceaſed father; becauſe "there is no diſtinction be-"tween the ſettlement of children with their father and "mother; for they are as much her's as the father's, and "nature obliges her, as much as the father, to provide for "them; ſo does the law; and every argument that holds "for their ſettlement with the father, holds as to their "ſettlement with the mother [c]." But that ſettlement which their mother acquires by marriage is not communicated to the children of the firſt marriage; becauſe it is then not her family, but her huſband's [d].

If ſhe gets a ſettlement by marriage?

Illegitimate children?

In the Engliſh law, it is *prima facie* held, that illegitimate children are ſettled where they are born. But there are exceptions to this general rule:

[a] H. 12. G. Weſtram and Chidingſtone. An Engliſhman, whoſe ſettlement "was not known, married, "had a child, and ran away: the "child was then nine years of age. "By the court, the mother and "children ought to be ſettled where "the mother was ſettled before mar-"riage." Foley, p. 252. Burn, ibid. p. 439.

[b] A man ſettled at St. Katherine's, married, and had ſix children born there, and died. After his death, his widow goes into the pariſh of St. George with her ſix children. The queſtion was, whether the children ſhould be ſettled where their father was laſt ſettled, or have a ſettlement with the mother in the pariſh of St. George? and the whole court were of opinion that the ſix children were ſettled in the pariſh of St. George, where the mother's laſt ſettlement was. Foley, 254, 1 ſeſſ. c. 69. Burn, ibid. p. 426.

[c] Chief-juſtice Parker. Foley, 254. Burn, ibid.

[d] Ibid.

§ 4. WHAT PARISH? —ILLEGITIMATE.

FIRST, If a woman come into a pariſh by privity, and c luſion of the officers of the pariſh to which ſhe belongs, a be there delivered of a baſtard, ſuch baſtard gains no ſet ment, notwithſtanding its birth [a].

SECONDLY.—So alſo, by the ſtatute of the 17 Geo. II, c where any woman, wandering and begging, ſhall be deliv ed of a child, in any pariſh or place to which ſhe does belong, and thereby becomes chargeable to the ſame, churchwardens or overſeers may detain her till they can ſ ly convey her to a juſtice of the peace. And if ſuch man ſhall be detained and conveyed to a juſtice, the chil which ſhe is delivered, if a baſtard, ſhall not be ſettled in place where ſo born, nor be ſent thither by a vagrant pa but the ſettlement of the woman ſhall be deemed the ſet ment of the child [b].

Birth place when not liable?

A CHILD born in the houſe of correction ſhall be ſen the place of its mother's ſettlement [c].

AND in the caſe of a baſtard born in the county gaol, court of king's bench reſolved that the ſettlement was the mother [d].

A BASTARD born in a lying-in hoſpital ſhall follow mother's ſettlement [e].

ALL baſtard children born in the houſe of induſtry of hundred, or other diſtrict, incorporated by act of parliam for the relief and employment of the poor, ſhall be deer

[a] Elſing, H. 2 G. Caſes of S. p. 66. But if a woman, with child of a baſtard, come accidentally into one pariſh, and is perſuaded by ſome of the pariſhioners to go into another pariſh, which ſhe doth, and there is delivered, this ſhall not charge that pariſh which ſuaded her. (3 Salk. 66.)

[b] S. 25.

[c] 2 Bulſtr. 358.

[d] 1 Seſſ. c. 94.

[e] 13 Geo. III, c. 82.

to belong to the pariſh or place where the mother of ſuch baſtard child was legally ſettled [a]. § 4. WHAT PARISH? —ILLEGITIMATE.

BY the act for the encouragement and relief of friendly ſocieties, every child which ſhall be born a baſtard in any pariſh or place, the mother whereof ſhall at the time of the birth of ſuch child be a member of any ſuch ſociety, and be reſiding in ſuch pariſh or place under the authority of that act, ſuch child ſhall have the ſame ſettlement which the mother had at the birth of ſuch child; any law, uſage, or cuſtom, to the contrary notwithſtanding [b]. Exception in favour of friendly ſocieties.

NOTWITHSTANDING the child's ſettlement, yet, nevertheleſs, if the mother and the child have different ſettlements, it ſeems that the baſtard child, even as all other children, ſhall go with the mother for nurture until the age of ſeven years, as a neceſſary appendage of the mother, and inſeparable from her [c]. During nurture?

BUT although the child may not be ſeparated from the mother, yet if ſhe voluntary deſert it, it ſeems that the cauſe of nurture then ceaſing, it may be ſent to its place of ſettlement.

WHILE the child continues with its mother as a nurſe child, and during that time not removeable to its place of

[a] 20 Geo. III, c. 36.

[b] 33 Geo. III, c. 54. § 25.

[c] As in the caſe of Skeffreth and Walford, M. 3, G. 2. The order was to remove a woman to her ſettlement; and her baſtard child, of two years of age, to another pariſh at a diſtance from the mother, being the place of its birth. It was objected, that the child being a nurſe child, they cannot ſeparate it from the mother, by reaſon of the care neceſſary to nurture ſo very young a child; which none can be ſuppoſed ſo fit to adminiſter as the mother of it; and therefore it ſhould have been ſent with her to the place of her ſettlement. And it was quaſhed by the court for that reaſon. (2 Seſſ. c. 90.)

§ 4. WHAT PARISH? —ILLEGITIMATE.

ſettlement, yet the pariſh where the child's proper ſettlement is, ſhall maintain ſuch child in that other pariſh [a].

THIS right of the mother to the cuſtody of her illegitimate offſpring, has frequently been the ſubject of judicial controverſy: but involving points not connected with the poor laws, it will be conſidered in a ſubſequent chapter of this book.

§ 5. CONCLUSION.

V. THIS very delicate, intereſting, and ſalutary branch of municipal juriſprudence, ſo ſucceſsfully cultivated by the Scottiſh legiſlature, has led us into more than our uſual detail. We may, however, congratulate ourſelves, that we have not occaſion to touch on a ſubject to which Dr. Burn finds it neceſſary to devote near ſeventy pages of his eſteemed account of the Engliſh poor laws,—the doctrine of removals, from which our ſiſter kingdom has ſuffered ſuch manifold evils, public and private, as have attracted the attention of her eloquent writers, and indeed repeatedly even of parliament itſelf; but are happily unknown to us. In the fulleſt enjoyment of civil liberty, and under circumſtances that "promote the free circulation of labour, and remove the "obſtacles by which induſtry is prohibited from availing it-

No removals in the Scottiſh law.

[a] As in the caſe of Darlington and Hemlington (H. 17, G. 3), Eleanor Guy went with a certificate from the townſhip of Hemlington to the townſhip of Darlington, in which laſt townſhip ſhe had two baſtard children, and there became chargeable. An order being thereupon made for the removal of her to Hemlington, ſhe took the two children who were born in Darlington with her, being both under the age of ſeven years. Two juſtices made an order upon the townſhip of Darlington for the maintenance of the two children born in that townſhip. Darlington appealed againſt the order of maintenance, and the ſeſſions being of opinion that Darlington was not liable, quaſhed the ſaid order; but the proceedings being removed into the court of king's bench, the court were of opinion that Darlington was obliged to maintain the two children at Hemlington, whilſt reſiding there with their mother as nurſe children, and therefore quaſhed the order of ſeſſions, and affirmed the order of the two juſtices. (Douglas, 9 Cal. caſ. 6.)

of its reſources [a]," the Scottiſh artizan or labourer t his own diſcretion, change his abode without chal- or controul, if only he avoid thoſe idle and vicious which expoſe him, as a rogue or vagabond, to the ance of the criminal magiſtracy. § 5. CONCLUSION.

[a] Mr. Pitt's Speech, ibid. cccx.

CHAP. III.

Of Vagrants.

§ 1. SCOTTISH ACTS, I. THE truly neceſſitous being legally provided in a maintenance, it becomes then equally juſt and neceſſary to puniſh thoſe who, though able to work, yet chuſe rather to live idly at the expence of others; wandering about the country, without any fixed reſidence: ſuch perſons, under various deſcriptions, are puniſhable in this as in every well regulated ſtate.

THE act 1617 [a], as already noticed, gives the juſtices of peace juriſdiction in this matter [b].

—SORNERS. OF thoſe perſons, one claſs, once very formidable, but now ſcarcely known to us, except by tradition and the books of adjournal, were ſorners, deſcribed by lord Bankton as

[a] Appendix I, No. 5.

[b] The previous acts, 1592, c. 147, and 1597, c. 268, at the date of which juſtices were not introduced into the country, ſpeak only of magiſtrates of boroughs and ſheriffs, who are enjoined to inquire; and leſt the magiſtrates and ſheriffs ſhould be remiſs, the kirk-ſeſſion of every pariſh is appointed to name commiſſioners to hold courts within their bounds, and try the offenders. Theſe powers are confirmed by act 1698, c. 21.

"maſterful, ſturdy beggars," that went in companies, oppreſſing the people, by conſuming victuals, and taking away goods, without conſent of the owners [a]. The ſuppreſſion of thoſe peſts to ſociety was the object of many ſevere enactments, from the ſtatute of Robert II, c. 12, downward; and indeed the ſtatutes 1445, c. 45 [b]; and 1477, c. 77, made the puniſhment capital; which, however, never appears to have been actually inflicted; unleſs where the general offence of forning was aggravated by particular acts of violence. —§ 1. SCOTTISH ACTS, —SORNERS

SORNERS being a ſpecies of vagrants, are to be underſtood as ſubjected to the juriſdiction of the juſtices of peace, as well as to that of the other magiſtrates mentioned in the ſtatutes.

THE moſt notorious claſs of vagrants are the Egyptians, or gypſies, firſt noticed in Europe about the year 1417, and not like the other ſtrollers an accidental aſſociation of vagabonds, but a diſtinct race of foreigners, who travelled into Europe from the Eaſt. They firſt appeared in Hungary and Bohemia, pretending they were pilgrims, and as ſuch they at firſt received paſſes from the princes through whoſe territories they travelled; but their morals not being found to correſpond to the ſanctity of that character, and their numbers alarmingly increaſing, as well from the idle and profligate of the different countries joining them, as from freſh ſwarms ſucceſſively coming from the Eaſt, they were baniſhed out of every European kingdom; out of Spain in the year 1492; out of Germany in the year 1500; out of France in the 1561 and 1612; and out of England in the reign of Henry VIII. —GYPSIES.

THE laws of Scotland likewiſe, in their numerous provi-

[a] Vol. I, book i, tit. 10. Appendix I, No. 36.

§ 1. SCOTTISH LAWS, AGAINST GYPSIES.

sions for the restraint of rogues and vagabonds, never fail to enumerate Egyptians, as among the foremost and most incorrigible, they are described as a counterfeit kind of rogues, who disguise themselves in strange habits, who smear their faces and bodies, who frame to themselves a canting kind of language, and who, under the pretence of telling fortunes, curing diseases, and such like things, delude the common people, and steal and pilfer whatever they conveniently can. Under this description, they have been proscribed by several statutes both in this and our sister kingdom. They were, by parl. 1609, c. 13, expelled from Scotland, under the designation of "the vagabonds, sorners, and common thieves, commonly called Egyptians;" with this penalty annexed, that if any of them were found within the kingdom, they might be imprisoned, and put to death. This act, Mr. Erskine says, is still in force, with this only exception, that persons so apprehended may bring witnesses to their character, in order that the jury may judge whether they fall under the designation of the statute. Indeed, so far back as the year 1698, the rigour of the statute began to be departed from.—The general charge of being *habite and repute* a gypsie, was not *per se* sustained as relevant, but only along with one or other of the facts of "picking or little thieving" libelled. This lenient construction was carried still farther in a subsequent case, 1699, June 26, Baillie, where the interlocutor of relevancy expressly required several acts of violence; and considering the long disuse of the antient severity which the present state of the country renders now no longer necessary, there seems reason to doubt whether this description of men, considered as a peculiar race, stand in any other predicament than that they are still punishable as vagrants, when guilty of any thing falling under the laws against that particular offence [a].

[a] Hume, vol. ii, c. 22.

VAGABOND ſcholars may alſo be mentioned, i. e. thoſe who are authorized to beg by a licence from their teachers; and in general, under this deſcription of vagabonds, or vagrants, the ſtatute 1579, c. 74, the leading regulation upon the ſubject, claſſes fortune-tellers, jugglers, players at unlawful and cunning games, people pretending to be prophets, all minſtrels who have no fixed ſervice, all who uſe forged licences to beg, or perſons who, without ſufficient teſtimonials, pretend to have ſuffered ſhipwreck, to have been burnt out of their houſes, and ſuch like; and, finally, all perſons whatſoever, who can give no good account of themſelves, or how they can lawfully earn their livelihood, or who, though able-bodied men, avoid every kind of work by which they might be ſupported. § 1. SCOTTISH ACTS, —VAGABOND SCHOLARS. —JUGGLERS, &c.

IN Scotland the legiſlature began early to enact laws for reſtraining idleneſs, and puniſhing thoſe claſſes of offenders[a]; whereof the principal is the ſaid act 1579, c. 74, by which all vagabonds, and ſtrong and idle beggars, betwixt the age of 14 and 70, as has been already remarked, are to be apprehended[b], and carried before the magiſtrates within borough, and in landward pariſhes, before any perſon whom the king ſhall conſtitute juſtice by his commiſſion, or whom the lords of regality ſhall appoint within their juriſdiction, and to be by them committed to priſon, in ſtocks, or irons, until they be put to the knowledge of an aſſize, to which they muſt be put, within ſix days after their impriſonment; and, upon conviction, they are to be ſcourged, and burnt through the ear with a hot iron, unleſs ſome perſon of credit and reſponſibility undertake, before the judge, under the penalty of *twenty pound*, to take and keep the offender in his ſervice for a year, and to bring him to the head court of the juriſdiction at the year's end. If the offender deſert his ſervice, he is in that caſe to ſuffer the puniſhment already mentioned; and if, af- —PUNISHMENT.

[a] Parliament 1424, c. 42. [b] Parl. 1579, c. 74. Appendix I, No. 49.

§ 1. SCOTTISH ACTS, —PUNISHMENT.

ter ſixty days, he reſume his former vagabond courſe of life, he is to ſuffer the pain of death as a thief; and in order that ſuch offenders may be more eaſily apprehended, there were various regulations made by that and other ſtatutes [a], which, however, need not be here particularly mentioned, being, if not expreſsly repealed, yet in a great meaſure ſuperſeded by the Britiſh ſtatute, commonly called the Vagrant Act, which regulates this matter all over the kingdom.

§ 2. GEO. II, 17TH, C. 5, VAGRANT ACT.

II. As this act is a general code reſpecting this ſubject, it was thought proper to give it entire in the appendix. Here, therefore, only a very general ſtatement of its contents can be neceſſary, and the notice of ſuch alterations and additions as have been introduced by ſubſequent enactments.

—CLASSES OF OFFENDERS.

THE ſtatute ſpecifies three claſſes of offenders, viz. *idle* and *diſorderly* perſons [b], *rogues* and *vagabonds* [c], and *incorrigible*

[a] Appendix I, No. 41.

[b] Beſides the different deſcriptions of perſons enumerated by this ſtatute (appendix i, p. clvi,) as included in this firſt claſs, there are farther mentioned by 32 Geo. III, c. 45, § 8, "all perſons who, by their wilful "default and neglect, permit their "wives and children to become "chargeable to their pariſhes or "places; and if it ſhall be made ap-"pear to two juſtices that ſuch per-"ſons do not uſe proper means to "get employment; or being able to "work, do neglect to work, or ſpend "their money in ale-houſes, or pla-"ces of bad report, or in any other "improper manner, and do not em-"ploy a proper proportion of the "money earned by them towards "the maintenance of their wives and "families, by which they, or any of "them, become chargeable to ſuch "pariſh or place."

[c] Who are included under the term *rogues* and *vagabonds*, ſee Appendix I, p. clvii. Farther, the ſtatute 23d Geo. III, c. 88, enacts, that "any "perſon apprehended, having upon "him any picklock, key, crow, jack, "bit, or other implement, with an "intent feloniouſly to break and en-"ter any dwelling-houſe, ware-houſe, "coach-houſe, ſtable, or outhouſe; or "ſhall have upon him any piſtol, "hanger, cutlaſs, bludgeon, or other "offenſive weapon, with intent fe-"loniouſly to aſſault any perſon; or "ſhall be found in or upon any "dwelling-houſe, ware-houſe, coach-"houſe, ſtable, or outhouſe, or in "any incloſed yard or garden, or "area belonging to any houſe, with "intent to ſteal any goods or chat-"tels;—ſhall be deemed a *rogue* and "*vagabond*, within the meaning of "the ſtatute of 17th Geo. II."

rogues[a], who are all punished in the manner particularly therein set forth. § 2. GEO. II, 17TH, C. 5, VAGRANT ACT, —CLASSES OF OFFENDERS.

IDLE and disorderly persons are punished with one month's imprisonment in the house of correction[b]; to be kept at hard labour. Any *one* justice may commit such offenders, being convicted before him, by his own view, confession, or oath of one witness; and, farther, may order any overseer, where such offender shall be apprehended, to pay five shillings to any person in such parish or place so apprehending them, for every offender so apprehended; to be allowed in his accounts, on producing the justice's order, and the person's receipt to whom it was paid. And if the overseer shall neglect, or refuse, to pay the same, the said justice, on oath thereof, may, by his warrant, order the same to be levied by distress and sale of his goods; in which case he shall not be allowed the same in his accounts[c]. One justice. Payment of 5s. Penalty for neglecting to pay the 5s.

ROGUES and vagabonds are to be punished with whipping and imprisonment, not exceeding six months; and incorrigible rogues with the like discipline and imprisonment, not exceeding two years. Any private person may apprehend a rogue and vagabond, and carry him to the justice or to a con- Rogues and vagabonds.

[a] As to what persons are included in this description, see Appendix I, No. 41, the first class is, engatherers offending against the statute of 13 Geo. I, c. 23, § 8, by which offence is meant, "the collecting, buying, receiving, or carrying, any ends of yarn, wefts, thrums, short yarn, or other refuse of cloth, drugget, or other woollen goods; and the punishment of such persons is in order to prevent their committing abuses by such practices in the woollen manufacture."

[b] 17th Geo. II, c. 5, § 1.

[c] This five shillings is another and quite different reward from the ten shillings which is given in an after clause for apprehending rogues and vagabonds: the latter is paid by the county; "but this is paid by the parish as a punishment for suffering their poor to beg. although within their own parish: for if they beg out of the parish, they incur a farther degree of guilt, becoming thereby rogues and vagabonds." Burn, tit. Vagrants, § 1.

§ 2. GEO. II, 17TH, c. 5, VAGRANT ACT, —PUNISHMENTS.

ſtable; and the juſtice may order a reward of 10s. to be paid to the perſon, whether conſtable or private individual, who apprehends him [a]. But no juſtice ſhall order any reward to be paid to any conſtable or other perſon apprehending any rogue or vagabond (women excepted), until he ſhall have been publicly whipped, or ſent to the houſe of correction, as the act requires, and until the examination be actually tranſmitted to the next ſeſſions [b]. The conſtable neglecting, or refuſing, his beſt endeavours to apprehend any ſuch offender, and convey him to ſome juſtice, or any other perſon being charged by any juſtice ſo to do, but refuſing, or neglecting, to give obedience, ſhall, on conviction thereof, on view, or oath of one witneſs, before one juſtice, forfeit ten ſhillings to the poor by diſtreſs [c].

No reward till the rogue be whipt.

Penalty for neglect.

One juſtice.

—PRIVY SEARCH.

A SEARCH, alſo, is directed to be made four times in the year [d]; and, by a ſubſequent ſtatute [e], *two* juſtices, in caſe any perſon apprehended upon a general privy ſearch, or by a ſpecial warrant, ſhall be charged before them with being a rogue or vagabond, or an idle and diſorderly perſon, or with ſuſpicion of felony (although no direct proof be then made thereof), may examine ſuch perſon on oath, as to his ſettlement, and means of livelihood; and the ſubſtance of ſuch examination ſhall be put in writing, and ſigned by ſuch perſon, and by the juſtices, and be tranſmitted to the next ſeſſion to be filed; and if ſuch perſon ſhall not ſhew that he has a lawful way of getting his livelihood, or ſhall not procure ſome reſponſible houſekeeper to atteſt his character, and to give ſecurity, if required, for his future appearance at ſome other day, to be fixed for that purpoſe, the juſtices may commit him to ſome priſon, or houſe of correction, for any time not exceeding ſix days; and in the meantime, or-

Two juſtices, when neceſſary.

Examination of one charged to be a rogue, though not proved to be ſo.

[a] § 5, Appendix I, p. clviii.
[b] 32 Geo. III, c. 45, § 2.
[c] § 5, Appendix I, p. clviii.
[d] § 6, Appendix I, p. clviii.
[e] 25 Geo. II, c. 36.

amination; and if no accuſation ſhall be then laid againſt
he ſhall be diſcharged, or otherwiſe dealt with accord-
o law [a].

HE juſtice, when any ſuch offender is brought before Examina-
muſt proceed to take his examination, wherein he muſt tion.
ided by the directions contained in § 7 [b].

HE puniſhment, as already mentioned, is whipping or Puniſhment
iſonment. The ſtatute 27 Geo. III, c. 11, directs the
e to order ſuch perſons ſo apprehended to be publicly
t by the conſtable, petty conſtable, or ſome other per-
o be appointed by ſuch conſtable or petty conſtable of
pariſh or place where ſuch perſon was apprehended, or
r him to be ſent to the common gaol [c], or houſe of cor-
ion, till the next ſeſſions, or for any leſs time ſuch juſtice
think proper [d], not under ſeven days [e].

BUT a ſtatute, already quoted, 32 Geo. III, c. 45, has in- No woman
duced two other exceptions: the one is, that no female, to be whipt
victed of being a rogue, vagabond, or incorrigible rogue,
re any juſtice, or at the ſeſſions, ſhall be whipped in any

[a] But" (Mr. Burn obſerves) the ſhortneſs of the time limited for advertiſing him, this ſeems juſtice for a certain time, as for fourteen days, under the vagrant act, is a commitment in *execution*, and that the

§ 6. GEO. II, 17TH, c. 5, VAGRANT ACT.

caſe whatever [a]: the other is, that no perſon ſhall be ſo whipped or impriſoned, who ſhall not have committed an act of vagrancy within the true intent and meaning of the act 17 Geo. II, c. 5, and been convicted thereof.

THUS, then, any one juſtice or magiſtrate, under theſe ſtatutes, may puniſh rogues and vagabonds, either by whipping, or by impriſonment until the next general ſeſſions; or for a ſhorter period. Commitments, under this act, are *in execution* [b].

Seſſions farther puniſh.

WHEN offenders are, as already mentioned, committed till the next ſeſſions, the juſtices at the ſeſſions may further order the rogue and vagabond to be detained in the houſe of correction to hard labour for any time not exceeding ſix months.

Puniſhment of rogues.

Of incorrigible rogues

OR, if he be an incorrigible rogue, for a further time not exceeding two years, nor leſs than ſix months; and, during his confinement, to be whipped at ſuch times and places as they ſhall judge fit. The offender, if a male above twelve years of age, may be ſent to his majeſty's ſervice by ſea or land [c].

Tranſportation.

BY the 13 and 14 Charles II, c. 12, § 23, the juſtices, in ſeſſions, may tranſport ſuch rogues, vagabonds, and ſturdy beggars, as ſhall be duly convicted and adjudged to be incorrigible.

THE ſtatute contains alſo various directions concerning the conveying of rogues and vagabonds to their proper pariſh [d]. Which regulations being found inſufficient, it was

[a] § 3.

[b] Dunſ. and Eaſt. 4. v. 220. Burn, tit. Vagrants, § 7.

[c] 17 Geo. II, c. 5, § 9.

[d] § 7, 8, 10, 11.

§ 6. GEO. II, 17TH, c. 5, VAGRANT ACT.

certificate, taking the petty conſtable's receipt; the high conſtable to be allowed the ſame by the treaſurer on paſſing his accounts, on his delivering up ſuch certificate and receipt, and giving his own receipt for the ſame to ſuch treaſurer; the ſame to be allowed the treaſurer in his accounts, on his delivering up the vouchers aforeſaid. And if the high conſtable ſhall refuſe or neglect to pay the ſame on demand, it ſhall be lawful for one juſtice, by his warrant, to "levy double the ſum by diſtreſs, and thereout to allow the "petty conſtable the ſum aſcertained by the certificate," and ſuch other recompence for his trouble, loſs of time, and expences, as the judge ſhall think fit; the overplus to be returned to the conſtable, on demand. And in cities, towns corporate, and other places, where there is no high conſtable, the petty conſtable ſhall be allowed what he ſhall ſo pay purſuant to ſuch certificate, in his accounts, on delivering up ſuch vouchers: or if any maſter of a houſe of correction ſhall deliver ſuch certificate and receipt to the treaſurer, the treaſurer ſhall pay the ſame to him, taking his receipt for the ſame, and be allowed the ſame in his vouchers.

One juſtice.

AND by the 26 Geo. II, c. 34, where the high conſtable hath not money in his hands ſufficient to anſwer the ſaid expences, the treaſurer ſhall pay the ſame to ſuch petty conſtable on his producing the certificate, and ſuch other vouchers, as aforeſaid.

What is to be done with them when carried to the place of removal.

WHAT is to be done with ſuch offender at the place to which he is ſent, is ſtated very diſtinctly in clauſes 11 and 19[a]; the caſe of Scottiſh and Iriſh vagrants in England, in clauſes 13 and 14[b]; with reſpect to lunatic vagrants, in clauſe 20[c]; the penalty for lodging vagrants, in § 23[d]; for hindering the execution of the vagrant act in § 22.

[a] Appendix I, p. clxiv, clxx.
[b] Ibid. p. clxvii.
[c] Ibid.
[d] Ibid.

§ 6. GEO. II, 17TH, C. 5, VAGRANT ACT.

Expence of executing the act how defrayed?

In order to defray the expences neceſſary for the execution of the vagrant act, it empowers the juſtices in ſeſſions to cauſe ſuch ſums as ſhall be neceſſary to be raiſed in the ſame manner as the general county rate [a]. In Scotland, the expence will be defrayed out of, what is called, the *rogue money*.

Appeal.

By clauſe 26th, it is provided, that any perſon aggrieved by any act of any juſtice out of ſeſſions, in or concerning the execution of this act, may appeal to the next general or quarter-ſeſſions of the county, liberty, riding, or diviſion, giving reaſonable notice thereof; whoſe order thereupon ſhall be final.

By perſons aggrieved, are underſtood ſuch perſons as are by the ſeveral clauſes of the act made ſubject to puniſhment and penalties. It was determined, therefore, by the court of king's bench, that an appeal does not lie to a pariſh againſt a vagrant paſs [b]. The only way ſuch pariſh has of obtaining redreſs, is by obtaining an original order of two juſtices to remove the vagrant to the place where he ſhould be ſent [c].

[a] § 33, Appendix I, p. clxxx.

[b] K. v. Rengwould, and K. v. St. Lawrence Jewry. Burn, tit. Vagrant, § 18.

[c] § 11, Appendix I.

CHAP. IV.

Of that Jurisdiction which respects the Health, Safety, and Convenience, of the Public.

§ 1. INFECTIOUS DISEASES.

I. THE general ſtatutes [a] expreſsly commit to juſtices of peace to "ſet down order in the country for gouernance in time of the plague." An old ſtatute [b] has preſcribed certain rules to be obſerved on ſuch occaſions; with reſpect to ſhutting up infected perſons in their houſes, or aſſigning them ſome place without the town to reſide; and providing for the ſupport of thoſe who "had na gudes "to finde themſelf." Juſtices of peace had juriſdiction in this matter under Britiſh ſtatutes likewiſe. The leading one was 28th Geo. II, c. 6; which, however, was varied

[a] Appendix I, p. xxxvii.

[b] 1457, James II, parl. 13, c. 57. It may be noticed as curious, in the phraſeology of this ſtatute, that, without ſpeaking of the king and parliament, it begins, "*the clergie thinks*," &c. The reaſon is, that this, as an affair to be governed by Chriſtian charity, was referred to the regulation of the clergy; and it was uſual in our acts of parliament to ſet down the report, without drawing it into the formality of an act of parliament. See 1483, James III, parl. 13, c. 90, 91. Sir Geo. Mackenzie's Obſervations, p. 51.

§ 1. INFECTION—PLAGUE. given for discharging the vessels who have complied with regulations [a].

Punishment THE observation of the regulations is enforced by vari penalties, according to their respective importance; the s master, or other person on board, neglecting the regulat contained in the thirteenth section; concealment by the ma that he has been at an infected place [b]; the refusing, or negl ing, within a convenient time after notice, to repair to the zaret; the escaping thence, and refusing to return [c]; the wi counterfeiting any certificate required by the statute [d]; concealment, or clandestine conveyance, of letters or go on shore [e], from lazarets, or ships under quarantine, or bezzlement of goods performing quarantine [f];—these death. fences are punished capitally.

Penalty OTHER offences are punished with special pecuniary pe ties, recoverable at the suit of the lord advocate, or any off of the customs [g]. Thus, the master's quitting a ship, after tice of its being liable to quarantine [h], or suffering others to so [i]; or not carrying the ships in time to the place appointed 500l. subject the respective offenders in the penalty of 500l. sterl

200l. THE penalty is 200l. sterling for omitting at sea to hoist flag as required [l]; or hoisting the signal when not liabl or, in the case of arrivals from foreign parts, omitting to form pilots of the place where the ship was loaded [n]; or fusing to answer the inquiries of the proper officer [p]; or q ting a ship after it is known to be liable to quarantine [q]; without the order of the officer of the customs, landing go from a ship which has performed quarantine abroad [r]. Pi conducting vessels, liable to quarantine, to places other than t

[a] § 27 and 28.
[b] § 19.
[c] § 23, 27.
[d] § 30.
[e] § 31.
[f] § 26.
[g] § 36.
[h] § 21.
[i] § Ibid.
[k] Ibid.
[l] § 14.
[m] § 15.
[n] § 16.
[p] § 16.
[q] § 11. Tog with six month prisonment.
[r] § 22.

appointed, are ſubjected in a penalty of 100l. In the caſe of any perſon landing goods or letters from a ſhip liable to perform quarantine [a]; or receiving the ſame ſo landed [b],—the penalty is diſcretionary, not under 100l. nor above 500l.' § 1. INFECTION —PLAGUE.

In Scotland all theſe forfeitures and penalties are recoverable by ſummary action before the court of ſeſſion, or by proſecution before the court of juſticiary, at the ſuit of the lord advocate, or any officer of the cuſtoms, and the penalty ſhall belong one moiety to the perſon who ſues, and the other to the king [c]. Juriſdiction. Application of the penalty.

In caſe any ſuit or proſecution be commenced at the inſtance of any officer of the cuſtoms, the lord advocate may ſtop proceedings therein [d].

ALL other offences (not being felony) committed againſt the proviſions of this act, and every diſobedience to any act of council relative thereto, for which no ſpecific penalty is provided, may be puniſhed, by any two juſtices of the county where it is committed, by a fine, not exceeding 50l. ſterling [e], or impriſonment, not exceeding three months, at the diſcretion of the two juſtices, who have heard and determined the ſame [f]. Two juſtices their powers.

ALL offences concerning the performance of quarantine, whether committed within the body of any county, or on the high ſeas, or elſewhere, may be tried in any county in England or Scotland reſpectively [g]. Action is not competent after the elapſe of two months [h]. If the defender is acquitted, he gets treble expences [i]. Forum.

[a] § 32.
[b] Ibid.
[c] § 34.
[d] § 36.
[e] § 23. This penalty is to be recovered and divided in the ſame manner, with the ſpecific penalties already mentioned.
[f] § 23. [g] § 42. [h] Ibid. [i] Ibid.

§ 2. VICTUALS.

II. IT is likewiſe the duty of juſtices of peace, and other magiſtrates, to prevent the expoſure of unwholeſome aliments to public ſale. Our ancient legiſlature ſeems, in particular, to have been extremely anxious for the purity of their wine. The ſelling or buying corrupt wine; the mixing of wine or beer was prohibited under the pain of death[c]. Innkeepers were prohibited from mixing their wines, under the pain of eſcheating, or forfeiting, all the wine belonging to them[d].

§ 3. FORESTALLING AND REGRATING.

III. CARE was alſo taken that the public ſhould not want a plentiful ſupply of proviſions. Hence the various regulations for encouraging fairs and markets[e], and the ſevere puniſhments denounced againſt foreſtallers and regraters; as to whom the general ſtatutes ordain [f] juſtices "to inform the "king's majeſty's council, or high treaſurer, or advocate, at "leaſt once every year, that order may be taken with them "conform to the acts of parliament;" which acts, during the late calamitous circumſtances of the country, were, for the moment, drawn from the happy obſcurity in which they had long remained, in conſequence of the improved ſtate of our agriculture and manufactures, as well as of the more liberal and enlightened policy of the preſent age[g].

FORESTALLERS, according to ſir John Skene, are properly thoſe "qua preocupies and byes merchandiſe before it "cum to the mercat, or ſtalle, or place quhair it ſuld be, or

[c] 1482, 88.

[d] 1551, 11; 1581, 126.

[e] Leges Burgorum. 91, &c.

[f] Appendix I, p. liv.

[g] The word foreſtalling is the ſame with the Saxon *foreſtaller*, from *fore* (before) and *ſtall*, a ſtanding place or department, and ſignifies, according to Burn, to market before the public, to prevent the public market, and metaphorically to interrupt in general.

Regrating, according to the ſame author, is derived from *re*, again, and the French, *grater*, to grate, or ſcrape; and ingroſſing is from in and groſs, great, or whole.

§ 3. FORESTALLING AND REGRATING.

and the third part to the ſheriff, or officer of the ſhire, provoſts, bailies, and officers of the boroughs, or to any other who finds them acting contrary to this ſtatute. By 1540, c. 98, it is ordained, that no perſon, either to borough or to land, ſhall buy any kind of fiſh at market, nor in other places, "to packe or peile till eleven hours of the day;" and that from this time till two o'clock afternoon, it ſhall be lawful to buy fiſh, and to *packe and peile* the ſame, as they think moſt expedient. This act contains ſome other things unneceſſary to be here mentioned, and concludes with enacting, that the provoſt, aldermen, and bailies, of boroughs, ſhall viſit the markets every market day, and ſet a price on all kinds of fiſh, according to the time: and that they, beſides, diligently inquire, if any perſon whatever gives arles or money on any kind of fiſh which is brought to market, for the purpoſe of making them to be ſold at a higher price, and that they take and puniſh ſuch perſons as foreſtallers and regraters, contrary to the intereſts of the public. And by c. 113 of the ſame parliament, if any foreſtallers be apprehended, foreſtalling any kind of merchandize, victuals, poultry, or goods whatſoever, within the freedom of borough, the officers of the borough are to eſcheat, or forfeit, ſuch goods, the one half to the king, and the other half to the borough. The magiſtrates of boroughs, and none other, are, by this act, to puniſh foreſtallers within the ſame. By 1579, c. 88, all theſe acts are ratified, and the magiſtrates of boroughs are conſtituted the king's juſtices for the execution of them.

NONE of theſe ſtatutes, however, contained any proper definition of either of the offences of foreſtalling or of regrating. To remedy this defect, the act 1592, c. 150, which is a literal tranſcript of the Engliſh ſtatute, 5 and 6 Edward VI, c. 14, on the narrative, "foraſmuch as ſundry acts of parliament have been made for puniſhment of foreſtallers and regraters, being very pernicious members in the common weal; yet, becauſe it has not been

§ 3. FORESTALLING AND REGRATING. "repute and holden; yet the libel, in that generality, shall "stand relevant, and the person accused to be put to the "knowledge of an assize: and if they come in will, or be "convicted by an assize, for common forestalling and re- "grating of markets, they shall incur, for the first fault, the "pain and unlaw of forty pundes, and shall find surety to "abstain in time coming, under the pain of a hundred "merks: and if he fall again in the second fault, the prin- "cipal, and his surety, to incur and pay the said sum of a "hundred merks; and for the third fault, the offender be- "ing convict, or come in will, to tine and forfeit all his "moveable goods, to be inbrought to our Sovereign lord's "use as escheat: and the justice courts or aires, for the ef- "fect foresaid, to be holden every year twice."

SIR GEORGE MACKENZIE says, forestallers are either, 1st, those who privately, or by entering into societies, buy up any goods, upon design, that, by making themselves masters of the commodity, they may exact such rates for them as they think fit; as, for example, a person offering to buy all the salmon in Scotland, and dealing with all persons who have any to sell; or purchasing up, in this manner, butter, cheese, eggs, &c. 2dly, Those who buy any commodities coming to market, before they are brought to the public stall, or place, where they ought to be sold. 3dly, Those who advise sellers to raise their prices, or dissuade them from coming to a public market. But it is happily unnecessary to follow him in the full discussion he gives this subject. The court of session lately delivered an unanimous opinion, that the statutory offence consisted entirely in buying up commodities actually on their way to market [a].

§ 4. NUISANCES. IV. ON the same account, magistrates are authorized, on particular occasions, to restrict individuals in the use of their

[a] 1801, February, Town of Ayr.

...nces detrimen-
...ence he may law-
...grounds, though the
...that improvement ſhould
...enement; but he muſt not
...of water than is neceſſary for
...n uſe would be merely *in emula-* Muſt not
...uild a fence, by the ſide of a river, to *aemulationem vi-*
...is ground by the overflow of the water, *cini.*
...a damage ſhould happen to his neighbour,
... the whole overflow, in time of flood, upon the
...ide [b].

...e manner, a proprietor was found intitled to build a
...n for burning lime, upon the very extremity of his
..., although it made his neighbour's dwelling very un-
...t [c].

...r uſe may be legally made of a running ſtream, is Running water.

...b. ii, tit. 1, § 2.
... Jupe 1741, Farquharſon.
...a. Supplement to the Dict.
...t it was found not lawful to
...puration in the *alveus*. Ac-
...r. an inferior heretor was

principle of this deciſion muſt have been, that the kiln was only offenſive and diſagreeable. For a brick-kiln, ſituated on the extremity of one's property, having done real damage to another by ſcorching the garden.

§ 4. NUISANCES

ſometimes a matter of difficulty. We had before occaſion to notice the act of parliament againſt ſteeping lint in running water, and ſir George Mackenzie's idea, that no ſuch prohibition would be competent at common law; but the court of ſeſſion have ſince pronounced two deciſions rather of a oppoſite tendency; conſidering that the "primary uſe of "water being in drink, no proprietor was intitled to employ "the water paſſing through his ground in any purpoſe "which could defeat that primary uſe to others who had "before enjoyed it[a]."

Nuiſances within burgh.

PROPERTY within borough is under ſtill greater reſtriction, as the magiſtrates may there prevent uſes of property which could not be interfered with in the country. Thus a fencing ſchool[b]; a blackſmith's forge, in an upper ſtore though vaulted[c]; a wright's ſhop, and timber-yard[d]; the ſlaughtering of cattle in a back area[e]; a printing-houſe on the floor of a tenement[f]; have been all found by the court of ſeſſion to be nuiſances within borough.

"it is enough if it renders the en-"joyment of life and property un-"comfortable;" and the court of ſeſſion ſeemed to take a ſimilar view of the law in the late caſe reſpecting a manufactory at Portobello, which was extremely offenſive to the whole neighbourhood, by the operation of boiling bull's blood. Jamieſon againſt Hillcoats, July 1800.

[a] Nov. 1791, Miller againſt Stein, and Ruſſel againſt Haig. In theſe caſes the rivers were polluted by the refuſe-water from a diſtillery. In the laſt caſe the interlocutor was, upon the circumſtances of the caſe, appealed and reverſed in the houſe of lords.

[b] February 24, 1756, Fleming againſt Ure. Falconer.

[c] June 20, 1756, Kinloch againſt Robertſon. Fac. Coll.

[d] Feb. 26, 1762, Proprietors Carrubber's cloſe againſt Reoch. 8 Dec.

[e] May, 1794, Palmer againſt Millan. In this caſe the court found the defender intitled to expoſe his meat for ſale in the front area (about nine feet wide in front, divided from Nicholſon's ſtreet, Edinburgh, by a parapet wall), provided he erected a ſhed over the place on which it was hung, and paved the area with ſtone.

[f] March 2, 1802, Robertſon againſt Pillans. But the learned reporter remarks, that "ſome of the judges "were moved by certain ſpecialties "in the caſe." Still more any encroachment on the public ſtreet. See W. Forbes againſt Ronaldſon, March 3, 1783. Sometimes even though ſupported by 40 years poſſeſſion; July 1780. Dict. vol. iv. Pub. pol.

§ 1. NUISANCES

In like manner the buildings are regulated. A ſpecial act, indeed, was paſſed, regulating the mode of building in the town of Edinburgh [a]. But, at common law, magiſtrates can prevent any thing taking place in the principal ſtreets that is offenſive. Thus, a building in a principal ſtreet, with piazzas below for the merchants to walk, and for commodities to be expoſed to ſale, was ordered to be removed, as an encroachment on the public ſtreet [b].

By the Engliſh law, no action lies for removing a public or common nuiſance, but an indictment only. Our law does not adopt this principle; but here, as well as in the whole doctrine of ſervitudes, is guided by the very different principles of the civil law. Thus the intruſion on the high ſtreet of Montroſe by piazzas, and the erection of ſhops in the piazzas, High ſtreet, Edinburgh, both above mentioned, were removed at the inſtance of private citizens.

[a] 1698, c. 8.

[b] Feb. 27, 1762, Magiſtrates of Montroſe againſt Scott.

CHAP. V.

Of the Fiars and Aſſize.

§ 1. OF THE FIARS.

I. AMID other matters of this nature, the regulatio the grain and bread was not overlooked.

The ſheriffs and ſtewarts, in their reſpective juriſdicti have been in the practice, for time immemorial, to ſtrik February, the fiars that is to fix the price of grain for preceding crop; according to which fiars all bargains ar gulated, whether the parties have not fixed any price, or expreſsly made a reference to the fiars. This matter i gulated by an act of ſederunt of the court of ſeſſion [a]. purpoſe of ſtriking is to aſcertain the current medium pr

[a] 21ſt December 1723. Act declaring and appointing the manner of ſtriking the ſheriff-fiars.

The lords of council and ſeſſion conſidering that the uſe of the ſheriff-fiars is to liquidate the price of victual in divers proceſſes that come before and the ſubordinate judicatories that there is a general complai the ſaid fiars are ſtruck and out by the ſheriffs without du and inquiry into the current an

II. THE aſſize of bread, again, is fixed from time to time by the magiſtrates within the reſpective royal boroughs. § 2. ASSIZE.

prices; and that when ſome ſheriffs proceed in ſtriking the fiars by way of inqueſt, yet they get not ſufficient evidence to the jury; and that other ſheriffs proceed arbitrarily and without an inqueſt; and that ſome of them entirely neglect to ſtrike fiars, which creates great uncertainty and much delay and expence in the adminiſtration of juſtice.

Therefore, the ſaid lords do hereby appoint and require the ſheriffs of Scotland, and their deputes, yearly, betwixt the 4th and 20th of February, to ſummon before them a competent number of perſons, living within the ſheriffdom, who have knowledge and experience of the prices and trade of victual in theſe bounds, and from them to chuſe fifteen men, whereof not fewer than eight ſhall be heritors, to paſs upon the inqueſt, and return their verdict on the evidence under-written, or their own proper knowledge concerning the fiars for the preceding crop, of every kind of victual, of the product of that ſheriffdom: and the ſaid ſheriffs and their deputes ſhall, to the ſame time and place unto which the jury is called, alſo ſummon the propereſt witneſſes, and adduce them and all other good evidence before the ſaid jury, concerning the price at which the ſeveral ſorts of victual have been bought and ſold, eſpecially ſince the 1ſt of November immediately preceding, until that day; and alſo concerning all other good grounds or arguments, from whence it may rationally be concluded by men of ſkill and experience, what ought to be eſtabliſhed as the juſt fiar prices for the ſaid crop; and any perſons then preſent may, in open court, and no otherwiſe, and obſerving due order and reſpect, offer information to the jury concerning the premiſes, and concerning the evidence adduced, or that might be adduced before them: and if it appear to the ſheriff or his deputes, or to the jury, that the adducing of proper evidence has been any way diſappointed, or that the evidence adduced is defective, the ſaid ſheriff or his deputes ſhall adjourn the jury till a certain and proper day, that ſufficient evidence may then be laid before them; and the jury being duly ſworn before the evidence be entered upon, when the ſame is concluded, the ſaid jury ſhall be and remain incloſed till they have finiſhed their verdict, which they ſhall return, ſigned by their chancellor and clerk, to the ſheriff or his deputes, at the time and place fixed for that purpoſe by the ſaid ſheriff or his deputes, when the ſaid jury was incloſed: and the ſaid ſheriff or his deputes, ſhall, on or before the firſt day of March, pronounce and give forth ſentence according to the ſaid verdict, determining and fixing the fiar prices for the crop preceding, of each kind of victual, of the produce of that ſheriffdom. And, farther, in ſuch ſhires, where the uſe and cutom has been, or where it may now be found needful and convenient, to ſtrike differ-

§ 2. ASSIZE. And this matter being now entirely regulated by Britiſh ſtatutes, we take this chapter from Dr. Burn.

Former acts repealed. THE ſtatute 31 Geo. II, c. 29, repeals all the former laws relating to the aſſize of bread, and re-enacts the ſame, with additions and amendments. "Which, throughout the whole, "is a very regular and judicious act; ſo that" (ſays Dr. Burn) "the author hath nothing more to do than to abridge "the ſame in the order as it ſtands: not being able, in "point of method, to alter it for the better."

Power to ſet the aſſize. To the intent that a plain and conſtant rule and method may be duly obſerved, in making and aſſizing of the ſeveral ſorts of bread which ſhall be made for ſale, in any place where an aſſize ſhall be thought proper to be ſet; it is enacted, that it ſhall be lawful for the court, or for the perſon or perſons herein authorized to ſet the aſſize of bread, to ſuit

ent fiars, according to the different qualities of the ſeveral ſorts of victual; the ſaid uſe, which experience has ſhewn to be good and profitable, ſhall be continued or introduced by the ſeveral ſheriffs reſpectively, and the ſaid different fiars ſhall be fixed and determined as the other fiars in manner above appointed. All which fiars the ſaid ſheriff or his deputes ſhall forthwith record in their books, and their clerks ſhall give extracts thereof to any perſon who aſks the ſame, and that for the payment of ſeven ſhillings Scots money, and no more, for the whole fiars of one year. And the ſaids lords of council and ſeſſion, that the adminiſtration of juſtice in the court of ſeſſion, and ſubordinate courts, may no longer ſuffer by the negligence and defects above mentioned, do hereby appoint, and ſtrictly require, the ſheriffs, and their deputes and clerks, punctually to obſerve the premiſes; and that the ſame be alſo obſerved by the ſtewards of Kirkcudbright, and of Orkney and Zetland, and their deputes and their clerks; and that the ſaid ſheriffs and ſtewards, their deputes and clerks do begin the obſervation thereof the firſt February next, as they regard and will be anſwerable for the due execution of their offices. And the ſaid lords appoint this act to be forthwith printed and publiſhed; and the clerks of ſeſſion are to give an extract thereof to each ſheriff and ſteward-clerk aforeſaid gratis, to the end it may be recorded in the ſaid ſheriffs and ſtewards books, which the ſaid ſheriff and ſteward-clerks are hereby enjoined to do accordingly.

§ 2. ASSIZE.

or aſcertain in any place within their juriſdiction, the aſſize and weight of all ſorts of bread which ſhall be made for ſale, or expoſed to ſale, and the price to be paid for the ſame, when and as often as they ſhall think proper [a]. And therein reſpect ſhall be had to the price, which the grain, meal, or flour, ſhall bear, in the market or markets, in or near to the places for which ſuch aſſize ſhall be ſet [b]; and making reaſonable allowance to the bakers for their charges, labour, and profit, as they ſhall deem proper [c]. Where an aſſize ſhall be thought proper to be ſet, no perſon ſhall make for ſale, or ſell, or expoſe to or for ſale, any ſort of bread, except wheaten and houſehold (otherwiſe brown bread), and ſuch other ſorts of bread as ſhall be allowed in the aſſize: but where it hath been uſual to make, or the perſons ſetting the aſſize ſhall allow the making of bread, with the meal or flour of rye, barley, oats, beans, or peaſe, or of any ſuch different ſorts of grain mixed together; the ſame may be there made and ſold accordingly: and if any perſon ſhall offend in the premiſes, and be convicted thereof, by confeſſion, or oath of one witneſs, before any magiſtrate or juſtice within the limits of their juriſdiction, he ſhall forfeit not exceeding 40s. nor leſs than 20s [d]. And in every place where an aſſize ſhall be thought proper to be ſet, the aſſize and weight of the ſeveral ſorts of bread which ſhall be there made, ſhall be ſet according to certain tables [e].

In proportion to the price of corn.

Allowance to the bakers.

Penalty of diſobeying the aſſize.

One juſtice.

One witneſs.

Tables of aſſize.

[a] 31 Geo. II, c. 29, § 2.
[b] Idem.
[c] Idem.
[d] § 3.
[e] Of the aſſize and price of bread made of wheat.—

Price of the bushel of wheat and baking.		WEIGHT.				PRICE.									
		The penny loaf				Quartern loaf,				Half peck,				Peck loaf,			
		Wheat.		Houſhd		Wheat.		Houſhd		Wheat.		Houſhd		Wheat.		Houſhd	
s.	d.	oz.	dr.	oz.	dr.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
2	9	22	4	29	4	0	3½	0	2½	0	6½	0	4½	1	0½	0	9½
3	0	20	4	27	1	0	3¾	0	2¾	0	7	0	5¼	1	1¾	0	10¾
3	3	18	9	25	4	0	3¾	0	2¾	0	7½	0	5½	1	3	0	11
3	6	17	6	23	3	0	4	0	3	0	8	0	6	1	4	1	0
3	9	16	6	21	6	0	4¼	0	3¼	0	8½	0	6½	1	5	1	1
4	0	15	4	20	4	0	4½	0	3½	0	9	0	6¾	1	6¼	1	1¾

§ 2. ASSIZE. EVERY aſſize which ſhall be ſet, in any city, town, cor rate, hundred, diviſion, liberty, rape, or wapentake, ſhall

4	3	14	4	19	1	0	4¾	0	3¾	0	9¾	0	7½	1	7½	1			
4	6	13	9	17	15	0	5	0	3¾	0	10¼	0	7¼	1	8¼	1			
4	9	12	12	17	1	0	5½	0	4	0	10¾	0	8	1	9¼	1			
5	0	12	1	16	6	0	5¼	0	4¼	0	11½	0	8½	1	11	1			
5	3	11	9	15	7	0	6	0	4½	1	0	0	9	2	0	1			
5	6	11	2	14	10	0	6¼	0	4¾	1	0¼	0	9½	2	1	1			
5	9	10	8	14	4	0	6½	0	5	1	1¼	0	9¾	2	2¼	1			
6	0	10	2	13	9	0	7	0	5¼	1	1¾	0	10¼	2	3¼	1			
6	3	9	11	13	1	0	7¼	0	5½	1	2¼	0	10¾	2	4¼	1			
6	6	9	4	12	10	0	7½	0	5¾	1	3	0	11	2	6	1	1		
6	9	9	0	12	1	0	7¾	0	6	1	3¼	0	11½	2	7	1	1		
7	0	8	11	11	9	0	8	0	6¼	1	4	1	0	2	8	2			
7	3	8	7	11	2	0	8¼	0	6½	1	4½	1	0½	2	9	2			
7	6	8	3	10	11	0	8½	0	6¾	1	5	1		2	10	2			
7	9	7	14	10	6	0	8¾	0	6¾	1	5½	1	1¼	2	11¼	2			
8	0	7	10	10	2	0	9¼	0	6¾	1	6¼	1	1½	3	0½	2			
8	3	7	5	9	15	0	9½	0	7	1	7	1	2	3	2	2			
8	6	7	2	9	9	0	9¾	0	7¼	1	7½	1	2½		3	2			
8	9	6	15	9	4	0	10	0	7½	1	8	1	3	3	4	2			
9	0	6	3	8	15	0	10¼	0	7¾	1	8½	1	3¼	3	5	2			
9	3	6	9	8	12	0	10½	0	8	1	9	1	3½	3	6¼	2			
9	6	6	7	8	8	0	10¾	0	8¼	1	9¼	1	4¼	3	7½	2			
9	9	6	4	8	5	0	11	0	8½	1	10¼	1	4½	3	8¼	2			
10	0	6	1	8	2	0	11¼	0	8¾	1	11	1	5	3	10	2	1		
10	3	5	15	7	15	0	11½	0	8¾	1	11½	1	5½	3	11	2	1		
10	6	5	13	7	11	1	0	0	9	2	0	1	6	4	0	3			
10	9	5	11	7	9	1	0¼	0	9¼	2	0¼	1	6½	4	1	3			
11	0	5	9	7	5	1	0½	0	9½	2	1	1	7	4	2	3			
11	3	5	6	7	3	1	0¾	0	9¾	2	1¼	1	7½	4	3¼	3			
11	6	5	5	7	2	1	1	0	10	2	2¼	1	7¾	4	4½	3			
11	9	5	2	6	15	1	1¼	0	10	2	3	1	8¼	4	5	3			
12	0	5	1	6	13	1	1½	0	10½	2	3½	1	8	4	7	3			
12	3	4	15	6	10	1	2	0	10¾	2	4	1	9	4	8	3			
12	6	4	14	6	8	1	2¼	0	10¾	2	4¼	1	9¼	4	9	3			
12	9	4	13	6	5	1	2½	0	11	2	5	1	10¼	4	10	3			
13	0	4	11	6	4	1	3	0	11½	2	5½	1	10½	4	11½	3			
13	3	4	9	6	3	1	3¼	0	11¾	2	6¼	1	10	5	1	3			
13	6	4	8	6	1	1	3½	0	11¾	2	7	1	11	5	2	3			
13	9	4	7	5	15	1	3¾	0	11¾	2	7¼	1	11½	5	3	3			
14	0	4	5	5	13	1	4	1	0	2	8	2	0	5	4	4			
14	3	4	4	5	11	1	4¼	1	0¼	2	8½	2	0½	5	5	4			
14	6	4	3	5	9	1	5	1	0¾	2	9	2	1	5	6	4			

In the firſt column is the price of the buſhel of wheat, Wincheſter meaſure, from 2s. 9d. to 14s. 6d. a buſhel, the allowance of the magiſtrates or juſtices to the baker for baking b included; and in the next two lumns are the *weights* of the fe loaves: then, in the other colu

ſet in avoirdupois weight, and not troy weight; and in the proportions directed by the ſaid tables, or as near as may be; and the ſaid tables ſhall extend as well to ſuch bread which ſhall be made of the flour of wheat mixed with the flour of other grain, as alſo to bread which ſhall be made with the flour of other grain than wheat, which ſhall be publicly allowed in any place to be made into bread; and the aſſize of

§ 2. ASSIZE.

are the *prices*. So that, for example, if the price of wheat is 5s. a buſhel, and the magiſtrate's allowance 1s. 6d. to the baker for baking; then oppoſite to 6s. 6d. in the firſt column, will be found the weight and prices of the ſeveral loaves.

And as the weight of the penny loaf is here only ſpecified, the weight of larger loaves may be eaſily aſcertained by addition; as, for example, a twopenny loaf (when wheat is at the ſame rate) is twice as much as the penny loaf, the ſixpenny loaf ſix times as much, and the eighteen penny loaf eighteen times as much.

Note, the wheaten loaves are three fourths of the weight of the houſehold loaves; and if the magiſtrates or juſtices ſhall think fit to allow any of the white loaves of the price of one penny or two pence, they are to weigh three fourths of the weight of the wheaten loaves of the ſame price.

And note, that the prices of the houſehold loaves are always three fourths of the prices of the wheaten loaves; and where it ſhall be thought proper to allow of half quartern loaves, the prices of ſuch loaves (if ſold ſingly) are to be half a farthing higher than is allowed by this table, when it ſhall ſo happen that the farthing is ſplit.

And magiſtrates and juſtices being to ſet the aſſize and fix the price of the ſeveral loaves of bread, having reſpect to the price which the grain, meal, or flour, of which the ſame are made, ſhall bear in the market; but no proviſion being made how they ſhall know what price the reſpective ſorts of meal and flour ſhould be eſteemed to bear, in proportion to the price of wheat; they are therefore to take notice, that the peck loaf of each ſort of bread is to weigh, when well baken, 17 lb. 6 oz. avoirdupois weight (which conſiſts of 16 drachms to the ounce, and 16 ounces to the pound), and the reſt in proportion; and that every ſack of meal or flour is to weigh 2 cwt. and 2 qrs. neat; and that from every ſack of meal or flour there ought to be produced, on an average, 20 ſuch peck loaves of bread; and, by obſerving the ſaid rule, magiſtrates and juſtices may, at all times, know if the baker hath more or leſs than the allowance they intend to give him.

§ 2. SIZE. all ſuch mixed bread ſhall be ſet as near as may be, according to the ſaid tables (§ 5.).

TABLE II,—Of the aſſize and price of bread made of the ſeveral grains here under mentioned.

No. 1. Price of buſhel and baking.		No. 2. Weight of the penny loaf,										No. 3. Weight of the peck loaf.									
		Rye		*Barley*		*Oats*		*Beans*		*Maſlin*		*Rye*		*Barley*		*Oats*		*Beans.*		*Maſlin*	
s.	d.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	oz.	dr.	s.	d.	s.	d.	s.	d.	s.	d	s.	d.
1	0	62	8	67	8	31	4	83	12	70	0	0	4½	0	4¼	0	9	0	3½	0	4
1	3	50	0	54	0	25	0	67	0	56	0	0	5½	0	5¼		11	0	4	0	5
1	6	41	10	45	0	25	14	5	12	46	10	0	6½	0	6¼	1	1½	0	5	0	6
1	9	35	1	38	9	17	14	47	14	40	0	0	7½	0	7¼	1	3½	0	5½	0	7
2	0	31	4	33	12	15	10	41	14	35	0	0	8¼	0	8¼	1	5½	0	6½	0	8
2	3	27	13	30	0	13	14	37	4	31	2	0	10	0	9¼	1	7½	0	7½	0	9
2	6	25	0	27	0	12	8	33	8	28	0	0	11	0	10¼	1	10	0	8½	0	10
2	9	22	11	24	9	11	6	30	7	25	6	1	0	0	11½	2	1	0	9½	0	11
3	0	20	13	22	8	10	7	27	14	25	5	1	1	1	0½	2	2½	0	10	1	0
3	3	19	4	20	12	9	10	25	12	21	8	1	2¾	1	1½	2	4½	0	10½	1	1
3	6	17	13	19	4	8	15	23	15	20	0	1	3¾	1	2½	2	6½	0	11½	1	2
3	9	16	11	18	0	8	5	22	5	18	10	1	4¾	1	3½	2	8½	1	0½	1	3
4	0	15	10	16	14	7	13	20	15	17	8	1	5¾	1	4½	2	11¼	1	1½	1	4
4	3	14	12	15	14	7	6	19	11	16	8	1	6¾	1	5½	3	0½	1	2½	1	5
4	6	13	14	15	0	6	15	18	10	15	9	1	8	1	7	3	2½	1	3	1	6
4	9	13	2	14	4	6	9	17	11	14	12	1	8¾	1	8	3	5¼	1	3½	1	7
5	0	12	8	13	8	6	4	16	12	14	0	1	10	1	9	3	8	1	4½	1	8
5	3	11	14	12	14	5	15	15	15	13	5	1	11¼	1	10	3	11	1	5¼	1	9
5	6	11	5	12	4	5	11	15	3	12	11	2	0¼	1	11	4	1	1	7½	1	10
5	9	10	13	11	12	5	7	14	9	12	2	2	1¼	2	0	4	3	1	7¼	1	11
6	0	10	6	11	4	5	3	13	15	11	10	2	2¼	2	1	4	5½	1	8	2	0
6	3	0	0	10	13	5	0	13	6	11	3	2	3¼	2	2	4	7¼	1	8¾	2	1
6	6	9	10	10	6	4	13	12	14	10	12	2	5	2	3	4	9	1	9½	2	2
6	9	9	4	10	0	4	10	12	6	10	6	2	6	2	4	5	0	1	10¼	2	3
7	0	8	15	9	10	4	7	11	15	10	0	2	7	2	5	5	1½	1	11¼	2	4

This table is divided into three columns: column firſt contains the prices of the buſhel of grain, the allowance for baking included; which prices are adapted ſo as to ſerve either for the Wincheſter buſhel of rye, barley, oats, beans, maſlin (otherwiſe miſcellany, conſiſting of two thirds wheat, and one third rye;) the price of either of which buſhels in the market being known, the magiſtrates are to add the intended allowance thereto; the amount of which being found in column firſt, the weight which the loaves ought to be will be found under the column No. 2; and the price of the reſpective peck loaves (which are to weigh 17 lb. 6 oz. each) under No. 3.

Example: when the price of the buſhel of barley in the market, with the allowance to the baker, is 4s. look for that ſum in column firſt; and under their reſpective titles in the ſame

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THE prices which the ſeveral kinds of grain, meal, and flour, allowed to be made into bread, ſhall *bona fide* ſell for in the markets or places in London, where ſuch grain, meal, and flour, ſhall be publicly ſold during the whole market, and not at particular times thereof, or on particular contracts only, ſhall from time to time be given in, and certified on oath, on ſome certain day in every week, as the court of mayor and aldermen ſhall appoint, by the mealweighers of the ſaid city, or ſuch other perſons as the ſaid court ſhall direct; and ſhall alſo, on ſome certain day in every week, to be appointed by the ſaid court, be entered by ſuch mealweighers or other perſons to be appointed as aforeſaid, in writing under their hands, in ſome book for that purpoſe, to be provided by the ſaid city, and kept at the town-clerk's office. And the next day, after every ſuch price ſhall be ſo given in and certified, the aſſize and weight of all ſorts of bread to be ſold or expoſed to ſale, and the price to be paid for the ſame, ſhall from time to time be ſet by the ſaid court, if then ſitting; if not, then by the mayor of the ſaid city. And the aſſize ſo ſet ſhall take place from ſuch time as the ſaid court ſhall order, and be in force for the ſaid city of London and the liberties thereof, and the weekly bills of mortality (the city of Weſtminſter and liberties thereof, the borough of Southwark, and weekly bills of mortality in the county of Surrey, excepted), until a new or other aſſize in London ſhall be ſet. And after the ſetting of every ſuch

Prices of grain how to be certified in London.

ſize will be found the weights which the ſeveral aſſize barley loaves ſhould be of, and the price of the peck barley loaf; and ſo of each of the other ſorts.

Note, where bread is allowed at at any time to be made for ſale, of peaſe only, the aſſize and price thereof are to be ſet and fixed from the bean columns: and where bread is ordered to be made for ſale, of a coarſe ſort of maſlin or miſcellany grain, conſiſting of one third rye, one third barley, and one third either peaſe or beans, the aſſize and price thereof are to be ſet and fixed from the barley columns.

Note alſo, that this table is framed for bread to be made of the whole produce of the ſaid ſeveral grains, except the bran or hull thereof only.

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aſſize by the ſaid court, or by the mayor when the ſaid court ſhall not ſit, the aſſize ſo ſet ſhall, with all convenient ſpeed, be made public, in ſuch manner as the ſaid court ſhall direct. But before any advance or reduction ſhall in any week be made by the ſaid court or mayor, in the price of bread, the mealweighers or ſuch other perſons as aforeſaid appointed to make return of the prices of grain, meal, and flour, ſhall leave in writing, at the common hall of the company of bakers, a copy of every return ſo made and entered by them as aforeſaid, ſome time of the ſame day on which they ſhall make the ſaid return and entry: to the intent that the ſaid company may, in the morning of the next day after every ſuch return and entry ſhall be made, and before any aſſize ſhall be ſet, have an opportunity to offer to the ſaid court or mayor reſpectively, all ſuch objections as they ſhall think fit, againſt any advance or reduction being that day made [a].

How in other cities and towns corporate.

THE court of mayor and aldermen of every other city where there ſhall be any ſuch court, and when ſuch court ſhall ſit; and where there ſhall be no ſuch court, or being any ſuch, when the ſame ſhall not ſit, the mayor, bailiffs, or other chief magiſtrate or magiſtrates of every ſuch other reſpective city; and in towns corporate, or boroughs, the mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates of every ſuch town corporate or borough; or two juſtices in ſuch towns and places where there ſhall be no ſuch mayor, bailiffs, aldermen, or chief magiſtrates, ſhall and may from time to time as there ſhall be occaſion, cauſe the reſpective prices which the ſeveral ſorts of grain, meal, and flour (fit to make the different ſorts of bread allowed there), ſhall *bona fide* ſell for in the reſpective public markets in or near to ſuch place, during the whole market, and not at particular times thereof, or on particular contracts only, to be

a § 6.

given in to them and certified upon oath, in ſuch manner, and by ſuch perſons, and on ſuch day in every week, as they ſhall reſpectively appoint. And the price which ſhall be ſo certified ſhall be entered by the perſons who ſhall certify the ſame, in books to be provided and kept by them for that purpoſe. And within two days after every ſuch price ſhall be ſo returned, the aſſize and weight of bread for ſuch place, and the price to be paid for the ſame, ſhall be ſet by ſuch court or magiſtrates reſpectively as aforeſaid. And the aſſize ſo ſet ſhall commence on ſuch day in every week, and be in force for ſuch time not exceeding ſeven days from the ſetting of ſuch aſſize, as ſuch court or magiſtrates reſpectively ſhall direct [a]. § 2. ASSIZE.

How in places within counties at large.

If two juſtices of counties at large, ridings, or diviſions, ſhall at any time think fit to ſet an aſſize of bread, for any place within the limits of their juriſdiction, in ſuch caſe it ſhall be lawful for ſuch two juſtices, to cauſe the price which grain, meal, and flour (fit to make the ſeveral ſorts of bread that ſhall be made for ſale in any ſuch place), ſhall *bona fide* ſell for in the reſpective public corn market or markets in or near any ſuch place, during the whole market, and not at any particular times thereof, or on ſpecial contracts only, to be given and certified on oath to them at their reſpective places of abode, on ſuch day in every week as they ſhall appoint, by the clerks of the market or markets in or near ſuch places, or ſuch other perſon as they ſhall for that purpoſe appoint. And the price ſo returned ſhall be entered by the perſons ſo returning the ſame in books to be provided by them and kept for that purpoſe. And within two days after ſuch return, the aſſize may be by them ſet for every ſuch place, for any time not exceeding fourteen days from the ſetting thereof. And the aſſize ſo ſet from time to time ſhall commence and be in force at ſuch time after every ſuch ſet-

[a] § 7.

§ 2. ASSIZE. ting thereof, and be made public in ſuch places for which the ſame ſhall be ſo ſet, in ſuch manner as the juſtices who ſet the ſame ſhall direct [a].

Bakers may inſpect the certificate. ANY maker of bread for ſale in any ſuch other city, town corporate, borough, or place, where the aſſize ſhall at any time be thought proper to be ſet, ſhall have liberty at all ſeaſonable times, in the day time, the next day after ſuch returns ſhall be made and entered as aforeſaid, to ſee the ſaid entry, without paying any thing for the ſame; to the intent every ſuch maker of bread for ſale may have an opportunity on the ſaid next day after ſuch entry made as aforeſaid, to offer to any ſuch court, mayor, bailiffs, aldermen, or other chief magiſtrate or magiſtrates, or juſtices as aforeſaid, who ſhall think fit to ſet ſuch aſſize within their reſpective juriſdiction; and before any ſuch aſſize ſhall be ſet, ſuch objections as he can reaſonably make againſt any advance or reduction to be made in ſuch aſſize ſo to be ſet as aforeſaid [b].

Bakers to pay no fee for the aſſize. No baker of bread for ſale ſhall be liable to pay any fee, gratuity, or reward, to any perſon for, or by means of any aſſize to be ſet [c].

[a] § 8. [b] § 9. [c] § 10. The form of the return, or certificate, ſhall be to the effect following. The prices of grain, meal, and flour, as ſold in the corn-market in in the of the day of

The beſt wheat at - -	by the buſhel.
The ſecond at - -	by ditto.
The third at - -	by the buſhel.
The beſt wheaten flour at -	by the ſack.
Houſehold flour at - -	by ditto.
Rye at - -	by the buſhel.
Ryemeal or flour at - -	by ditto.
Barley at - -	by ditto.
Barleymeal at - -	by ditto.
Oats at - - -	by ditto.
Oatmeal at - -	by
White peaſe at - -	by the buſhel.
White pea flour or meal at - -	by
Beans at - -	by the buſhel.
Bean meal or flour at - -	by

AND the half peck and quarter of a peck loaves of wheaten and houſehold bread are to weigh in proportion to the weight a peck loaf of wheaten or houſehold bread ought to weigh; and to be ſold accordingly in proportion. And when any bread ſhall be ordered to be made with the meal or flour of rye, barley, oats, peaſe, or beans, either alone, or mixed with the meal or flour of any other grain; the aſſize of ſuch bread ſhall be made public, in ſuch manner as the magiſtrates or juſtices who ſhall ſet ſuch aſſize ſhall from time to time direct [a]. In places where any ſixpenny, twelvepenny, and eighteenpenny, loaves ſhall be allowed to be made or ſold, no peck, half peck, or quarter of a peck, loaves ſhall be allowed at the ſame time to be made or ſold; to the

§ 2. ASSIZE.

Bread of different denominations not to be allowed at the ſame time.

To every of which returns the perſons appointed to make the ſame ſhall ſign their names or marks. (§ 11.)

When an aſſize ſhall be ſet, the ſame ſhall be made public, in the form, or to the effect following:

To wit, { The aſſize of bread ſet the day of for to take place on the day of now next enſuing, and to be in force for the ſaid of

And in places where penny, twopenny, ſixpenny, twelvepenny, and eighteenpenny, loaves, ſhall be made, as followeth:

	lb.	oz.	dr.
The penny loaf wheaten is to weigh -			
Ditto houſehold is to weigh - -			
The twopenny loaf wheaten is to weigh -			
Ditto houſehold is to weigh - -			
The ſixpenny loaf wheaten is to weigh -			
Ditto houſehold is to weigh - - -			
The twelvepenny loaf wheaten is to weigh -			
Ditto houſehold is to weigh - - -			
The eighteenpenny loaf wheaten is to weigh -			
Ditto houſehold is to weigh - -			

And in places where quarters, half peck, and peck, loaves be made, then as follows:

	lb.	oz.	dr.		s.	d.
The peck loaf wheaten is to weigh -				and is to be ſold for		
Ditto houſehold is to weigh				and is to be ſold for		

[a] § 12.

§ 2. ASSIZE.

intent that one of thoſe ſorts of loaves may not be ſold, deſignedly or otherwiſe, for the other ſort thereof, to the injury of unwary people: on pain that every one offending in the premiſes ſhall forfeit not exceeding 40s. nor leſs than 20s. as the magiſtrate or juſtice before whom ſuch offender ſhall be convicted ſhall think fit [a]. If the juſtices of any county, riding, or diviſion, ſhall in their ſeſſions think fit to aſcertain that any hundred or other place within ſuch diviſion ought to be eſtimated as of or in any one particular hundred, riding, or diviſion, of any ſuch county, riding, or diviſion, in order that the aſſize of bread which ſhall be ſet for ſuch particular hundred or place may extend to or compriſe ſuch other hundred or place; in ſuch caſe it ſhall be lawful for them ſo to do: but by ſo doing thereof, no juſtice of any ſuch county, riding, or diviſion, ſhall be excluded from acting as a juſtice in any hundred, riding, or diviſion, of any ſuch county, in which any ſuch particular towns, diſtricts, or places, ſhall lie, or the aſſize for them ſhall be ſet [b]. An entry ſhall be made from time to time by the clerk of the market, or other perſon appointed to make return as aforeſaid, in a book to be provided and kept by him, of every return by him made; and alſo of the rate at which the price, aſſize, and weight, of bread ſhall be ſet within his juriſdiction: which book any inhabitant may at all ſeaſonable times in the day inſpect without fee [c]. After the aſſize ſhall be ſet, no alteration ſhall be made therein in any ſubſequent week, either to riſe or ſink the ſame, except when the price of wheat or other grain ſhall be returned as having riſen or fallen 3d. a buſhel ſince the laſt return; no proviſion being made by the aſſize tables for altering any aſſize, when the variation in the price ſhall not have amounted to, and been returned, 3d. a buſhel [d].

Hundreds may be divided for ſetting the aſſize.

Clerk of the market to keep books.

Aſſize not to be altered till the price of corn alters 3d. a buſhel.

[a] § 13.
[b] § 14.
[c] § 15.
[d] § 16.

§ 2. ASSIZE.

Punishment of officers for default.

If any mealweigher, clerk of the market, or other person appointed to make returns as aforesaid, shall neglect, omit, or refuse, to do any thing by this act required to be done by him, or shall designedly or knowingly make any false return; or if any constable or other peace officer shall refuse or neglect to obey any warrant in writing, delivered to him under the hand and seal of any magistrate or justice, or to do any other act requisite to be done by him for carrying this act into execution, he shall forfeit not exceeding 5l. nor less than 20s[a]. If any buyer or seller of, or dealer in, corn, grain, meal, or flour, on reasonable request to him made by the mealweighers of the city of London, or by the clerks of the market or other person respectively appointed to make returns as aforesaid, shall refuse to disclose and make known to them the true real prices which the several sorts of grain, meal, and flour, shall be *bona fide* bought at or sold by or for him, at any corn-market, or other place where corn, grain, meal, or flour, is usually openly or publicly sold; or shall knowingly give in any false or untrue price, or which hath been made by any deceitful means; he shall, on conviction thereof, by confession, or oath of one witness, or affirmation of a quaker, forfeit not more than 10l. nor less than 40s[b]. If any court, magistrate, or justices, who shall have ordered any return to be made as aforesaid, shall, within three days after such return, suspect that the same was not truly and *bona fide* made, they may summon before them any person who shall have bought or sold, or agreed to buy or sell any grain, meal, or flour, within their respective jurisdictions, or who shall be thought to be likely to give any information concerning the premises; and may examine them upon oath, touching the rates and prices which the several sorts of grain, meal, and flour, or any of them, were really and *bona fide* bought at, or sold for, or agreed so to be, by him, at any time within seven days preceding such sum-

Buyer or seller to declare the price of corn.

Magistrates may send for them.

[a] § 17. [b] § 18.

§ 2. ASSIZE.

mons. And if any perſon be ſummoned ſhall neglect or refuſe to appear (proof of ſuch ſummons being made u oath); or if any perſon ſo ſummoned ſhall appear, and glect or refuſe to anſwer ſuch lawful queſtions touching premiſes as ſhall be propoſed to him, without ſome juſt reaſonable excuſe to be allowed by ſuch court, magiſtrate, juſtices; he ſhall, on conviction by oath of one witneſs, by confeſſion, forfeit not exceeding 10l. nor leſs than 4 And if any perſon ſo examined ſhall wilfully forſwear hi ſelf, he ſhall ſuffer as in caſes of perjury.—Provided, th the party ſummoned be not obliged to travel above five mi from the place of his abode [a].

Baker of bread made of other grain than wheat ſhall conform to the aſſize.

WHENEVER any court, magiſtrate, or juſtices, as afo ſaid, ſhall order any bread to be made with the flour or m of any other grain than wheat, or to be mixed with the fl of wheat, or to be made with the flour or meal of any ot ſorts of grain, either ſeparate or mixed together; all perſ who ſhall make any bread for ſale, in any place where ſ order ſhall be made, ſhall make bread with ſuch mixed m or flour, in ſuch manner, and of ſuch weight and goodn and ſhall ſell the ſame at ſuch prices, as ſuch court, ma ſtrate, or juſtices, reſpectively, ſhall direct; on pain of f feiting not more than 5l. nor leſs than 40s [b].

Regulations by 36 Geo. III, c. 22, for making mixed bread.

AND whereas it is expedient, in order to diminiſh conſumption of wheat, that bakers ſhould be permitted make and ſell mixed bread, which they cannot now do places where an aſſize is ſet: and whereas it is not ex dient to apply to ſuch ſorts of bread the reſtrictions in tables of the aſſize and price of bread now eſtabliſhed. is enacted, that any perſon in any place whatſoever, whet any aſſize of bread has been ſet or not, may make and *peck, half peck, quartern, and half quartern, loaves*, made of

[a] § 19. [b] § 20.

le produce of wheat, deducting only 5 lb. of bran per bel; or made of any ſort of wheaten flour mixed with al, or flour of barley, rye, oats, buck wheat, Indian corn, fe, beans, rice, or any other kind of grain, or potatoes, in h proportions, and at ſuch prices, as the maker and ſeller reof ſhall deem reaſonable [a]. § 2. ASSIZE.

WHEATEN bread of an inferior quality to the aſſized ead, muſt be marked with a large roman H; and mixed ead with a large roman X [b].

IF any perſon omit to imprint, or diſtinctly mark, the read, in terms of the act, or ſhall not well make, or ſhall ulterate it with any mixture or ingredient, not allowed to e uſed in the making of bread; or ſhall ſell peck, half peck, uartern, half quartern, or other loaves deficient in weight, ccording to the aſſize of ſuch denominations, reſpectively, e ſhall be liable to the like pains ſpecified in the ſtatute for ich offences. See 31 Geo. II, c. 29. Marking. Penalty for not marking, or adulteration.

PROVIDED that this act ſhall not affect the rights of the bakers company in London [c].

[a] 36 Geo. III, c. 22, § 1. This act was repealed by the 41 Geo. III, c. 16, § 12, revived (and the latter repealed) by 41 Geo. III, ſeſſ. 2, c. 2, but ultimately repealed in part, and varied by the ſtatute 41 Geo. III, (U. K.) c. 12; which makes it lawful to bake "peck loaves, half peck loaves, "quartern loaves, and half quartern "loaves, made of wheaten meal, or "flour, of the whole produce of the "wheat, or with the bran only, or "with the bran and pollards, or any "proportion of the bran and pollards, "or any other part of the produce of "ſuch wheat taken therefrom," at any price leſs than the aſſize or price of wheaten bread. This act narrows the other ſo far, as to require the mixture to be not of different kinds of grain, but of the different parts of the produce of the wheat in any proportion. On the other hand, it would appear, to extend the 13 Geo. III, which allowed the making of the old ſtandard wheaten bread, that is, of the whole grain, excepting the bran or hull.

[b] 41 Geo. III, (U. K.) c. 12, § 2.

[c] Ibid. § 3.

§ 2. ASSIZE.

THE ſeveral ſorts of bread which ſhall be made for
or ſold, or expoſed to or for ſale, ſhall always be well m
True making of bread and in their ſeveral and reſpective degrees, according tc
goodneſs of the ſeveral ſorts of meal or flour whereof
ſame ought to be made; and no allum, or preparatio
mixture in which allum ſhall be an ingredient, or any c
ingredient or mixture whatſoever (except only the ger
meal or flour which ought to be put therein, and cor
ſalt, pure water, eggs, milk, yeaſt, and barm, or ſuch le
as ſhall be allowed to be put therein by thoſe who hav
the aſſize, and where no aſſize ſhall be ſet, then ſuch le
as any magiſtrate or juſtice within his juriſdiction ſha
low to be uſed in making of bread), ſhall be put into,
anywiſe uſed in making dough, or any bread to be ſol
as or for leaven to ferment any dough, or on any othe
count, in the trade or myſtery of making bread, under
colour or pretence whatſoever; on pain that every pe
(other than a ſervant or journeyman) who ſhall knowi
offend in the premiſes, and ſhall be convicted here
confeſſion, or oath of one witneſs, before any ſuch n
ſtrate or juſtice, reſpectively, ſhall forfeit not more than
nor leſs than 40s.; or ſhall, by warrant of ſuch magi
or juſtice, be apprehended and committed to the hou
correction, or ſome priſon of the county, city, town-c
rate, borough, riding, diviſion, or place, where the of
ſhall have been committed, or the offender ſhall be a
hended, there to remain and be kept to hard labour, fo
time not exceeding one kalendar month, nor leſs tha
days, from the time of ſuch commitment, as ſuch magi
or juſtice ſhall think fit. And if any ſervant or journe
baker ſhall knowingly offend in the premiſes, and be
victed thereof as aforeſaid, he ſhall forfeit not more th
nor leſs than 20s. or ſhall in like manner be committ
the houſe of correction or priſon, as aforeſaid. And it
be lawful for the magiſtrate or juſtice, before whom
offender ſhall be convicted, out of the money forfeited,

recovered, to cauſe the offender's name, place of abode, and offence, to be publiſhed in ſome newſpaper, which ſhall be printed or publiſhed in or near the county, city, or place, where any ſuch offence ſhall have been committed [a]. § 2. ASSIZE.

No perſon ſhall knowingly put into any corn, meal, or flour, which ſhall be ground, dreſſed, bolted, or manufactured for ſale, either at the time of grinding, dreſſing, bolting, or in anywiſe manufacturing the ſame, or at any other time, any ingredient, mixture, or other thing whatſoever; or ſhall knowingly ſell, offer, or expoſe to ſale, any meal or flour of any ſort of grain, as or for the meal or flour of any other ſort of grain, or any thing as or for or mixed with the meal or flour of any grain which ſhall not be the real and genuine meal or flour of the grain the ſame ſhall import to be and ought to be; on pain of forfeiting not more than 5l. nor leſs than 40s [b]. Adulterating meal.

No perſon ſhall knowingly put into any bread which ſhall be made for ſale, any mixture of meal or flour of any other ſort of grain than of the grain the ſame ſhall import to be, and ſhall be allowed to be made of, in purſuance of this act; or ſhall put into any bread which ſhall be made for ſale, any larger or other proportion of any other or different ſort of grain, or the meal or flour thereof, than what ſhall be appointed or allowed to be put therein by this act; or any mixture or thing as, for, or in lieu of flour, which ſhall not really be the genuine flour the ſame ſhall import to be and ought to be, on pain of forfeiting not more than 5l. nor leſs than 20s [c]. Undue mixtures of meal.

If any perſon who ſhall make any bread for ſale, or who Penalty for deficiency in weight.

[a] 31 Geo. II, c. 29, § 21.
[b] § 22.
[c] § 23.

§ 2. ASSIZE. ſhall ſend out, or ſell, or expoſe to or for ſale, any bread which ſhall be deficient in weight, according to the aſſize which ſhall be ſet for the ſame, he ſhall forfeit not exceeding 5s. nor leſs than 1s. for every ounce wanting in the weight every ſuch loaf ought to be of; and for every loaf which ſhall be found wanting leſs than an ounce, ſhall forfeit not exceeding 2s. 6d. nor leſs than 6d. as ſuch magiſtrate or juſtice before whom ſuch bread ſhall be brought ſhall think fit: ſo as ſuch bread which ſhall be complained of for wanting weight, in any city, town corporate, borough, liberty, or franchiſe, having juriſdiction thereof, or within the weekly bills of mortality, ſhall be brought before ſome magiſtrate, or juſtice having juriſdiction in the premiſes, and weighed before him, within twenty-four hours after the ſame ſhall have been baked, ſold, or expoſed to ſale; and ſo as ſuch bread which ſhall be complained of for wanting weight in any hundred, riding, diviſion, liberty, rape, wapentake, or place, ſhall be brought before ſome juſtice within ſuch juriſdiction, and weighed before him within three days after the ſame ſhall have been baked, ſold, or expoſed to ſale; unleſs it be made out to the ſatisfaction of ſuch magiſtrate or juſtice, on the behalf of the party complained of, that ſuch deficiency in weight wholly aroſe from ſome unavoidable accident in baking, or otherwiſe, or was occaſioned by ſome contrivance or confederacy [a].

Mark. EVERY perſon who ſhall make for ſale, or ſell, or expoſe or ſend out to or for ſale, any ſort of bread whatſoever, ſhall cauſe to be fairly marked on every loaf made, ſold, carried out, or expoſed to ſale as wheaten bread, a large roman W; and upon every loaf made, ſold, carried out, or expoſed to ſale as houſehold or brown bread, a large roman H; on pain of forfeiting for every loaf not ſo marked, not more than 2s. nor leſs than 5s. (except as to ſuch loaves which ſhall

[a] § 24.

ter the beſpeaking or purchaſing thereof, by the par- § 2.
:ſire of any perſon who ſhall order the ſame to be ASSIZE.
r his own uſe[a].

ker or other perſon ſhall aſk or take, for any bread Penalty for
ſhall ſell or expoſe to ſale, any greater price than ſelling for a greater
d ſhall be aſcertained to be ſold at by the aſſize as price than is ſet by the
; and no baker, or other perſon who ſhall make any aſſize.
ſale, ſhall refuſe or decline to ſell any loaf or loaves
f the ſorts of bread which, in purſuance of this act,
llowed or ordered to be made, to any perſon who
der ready money in payment for the ſame, at the
for the ſame by the aſſize, when ſuch perſon ſhall
loaf in his poſſeſſion to be ſold, more than ſhall be
for the immediate neceſſary uſe of his family or
mers, and which it ſhall be incumbent on ſuch baker
perſon complained of to prove before the magiſtrate
: to whom ſuch complaint ſhall be made, if thereun-
:ed by the party complaining, on pain of forfeit-
:very ſuch offence, not more than 40s. nor leſs than

rſon ſhall ſell or offer to ſale any bread of an in- Bread inferior to
ality to wheaten bread, at a higher price than houſe- wheaten
ld ſhall be ſet at by the aſſize, on pain of forfeiting ſhall not be ſold for a
nvicted thereof by confeſſion, or oath of one wit- higher price
ore one magiſtrate or juſtice) the ſum of 20s [c]. than houſehold.

the 2 and 3 Ed. 6, c. 15,
er ſhall conſpire not to ſell
at certain prices, every
1 ſhall forfeit 10l. for the
:e; and if not paid in ſix
ail be impriſoned twenty
days, and have only bread and water for his ſuſtenance; for the ſecond offence 20l. or the pillory; and for the third offence 40l. or the pillory, and loſs of an ear, and to become infamous. And the ſeſſions or leet may hear and determine the ſame.

[c] § 27.

§ 2. ASSIZE.

Houſes may be entered to ſearch for bread.

IT ſhall be lawful for any magiſtrate or juſtice, or for any peace officer, authorized by warrant of ſuch magiſtrate or juſtice, at ſeaſonable times in the day-time, to enter into any houſe, ſhop, ſtall, bakehouſe, warehouſe, or outhouſe, of or belonging to any baker or ſeller of bread, to ſearch for, view, weigh, and try all or any the bread, which ſhall be there found: and if any bread, on any ſuch ſearch, ſhall be found to be wanting, either in the goodneſs of the ſtuff whereof it ſhall be made, or to be deficient in the due baking or working thereof, or ſhall be wanting in the due weight, or not truly marked, or ſhall be of any other ſort of bread than ſhall be allowed to be made by virtue of this act; any ſuch magiſtrate, juſtice, or peace officer, may ſeize the ſame; and ſuch magiſtrate or juſtice may diſpoſe thereof, as he in his diſcretion ſhall think fit, for the better carrying of this act into execution [a].

Mills and other places may be entered to ſearch for adulterated meal.

IF information ſhall be given on oath, to any magiſtrate or juſtice, that there is reaſonable cauſe to ſuſpect that any miller who grinds any grain for toll or reward, or any perſon who doth dreſs, bolt, or in anywiſe manufacture any meal or flour for ſale, or any maker of bread for ſale, doth mix up with or put into any meal or flour ground or manufactured for ſale, any mixture, ingredient, or thing whatſoever, not the genuine produce of the grain ſuch meal or flour ſhall import and ought to be, or whereby the purity of any meal or flour in the poſſeſſion of any ſuch miller, mealman, or baker, ſhall be in anywiſe adulterated, it ſhall be lawful for any ſuch magiſtrate or juſtice, and alſo for any peace officer, authorized by the warrant of ſuch magiſtrate or juſtice, at all ſeaſonable times in the day-time, to enter in any houſe, mill, ſhop, bakehouſe, ſtall, bolting-houſe, pantry, warehouſe, or outhouſe, of or belonging to any ſuch miller, mealman, or baker, and to ſearch and examine what

[a] S. 28, 32 Geo. II, c. 18, § 2.

ther any mixture, ingredient, or thing, not the genuine pro- § 2. ASSIZE.
duce of the grain ſuch meal or flour ſhall import or ought to be, ſhall have been mixed up with or put into any meal or flour in the poſſeſſion of any ſuch miller, mealman, or baker, either in the grinding of any grain at the mill, or in the dreſſing, bolting, or manufacturing thereof, or whereby the purity of any meal or flour ſhall be in anywiſe adulterated: and if on ſuch ſearch it ſhall appear, that any offence hath been committed in any place allowed to be ſearched as aforeſaid, it ſhall be lawful for any magiſtrate, juſtice, or officer, authorized as aforeſaid, to ſeize any meal or flour which ſhall be deemed on ſuch ſearch to have been adulterated, and all mixtures and ingredients which ſhall be found and deemed to have been uſed or intended to be uſed for ſuch adulteration; and ſuch thereof as ſhall be ſeized by ſuch peace-officer ſhall, with all convenient ſpeed, be carried to ſome magiſtrate or juſtice: and if any magiſtrate or juſtice, who ſhall make any ſeizure in purſuance of this act, or to whom any thing ſeized ſhall be brought, ſhall adjudge that any mixture or ingredients, not the genuine produce of the grain any ſuch meal or flour which ſhall have been ſo ſeized ſhall import and ought to be, ſhall have been put into any ſuch meal or flour, or that the purity of any ſuch meal or flour ſo ſeized was adulterated by any mixture or ingredient put therein; in ſuch caſe, every ſuch magiſtrate or juſtice is hereby required to diſpoſe of the ſame, as he in his diſcretion ſhall think proper [a].

EVERY miller, mealman, baker, or ſeller of bread as afore- Penalty of having in poſſeſſion unlawful ingredients.
ſaid, in whoſe houſe, mill, ſhop, bakehouſe, ſtall, bolting-houſe, paſtry, warehouſe, outhouſe, or poſſeſſion, any mixture or ingredient ſhall be found, which ſhall be adjudged by any magiſtrate or juſtice to have been lodged there with an intent to have adulterated the purity of meal, flour, or

[a] 31 Geo. II, c. 29, § 29.

§ 2. ASSIZE. bread, ſhall, on conviction by confeſſion, or oath of one witneſs before any ſuch magiſtrate or juſtice, forfeit not exceeding 10l. nor leſs than 40s. unleſs the party charged with ſuch offence ſhall make it appear to the ſatisfaction of ſuch magiſtrate or juſtice, that ſuch mixture or ingredient was not brought or lodged where the ſame was ſeized, with deſign to have been put into any meal or flour, or to have adulterated the purity thereof, but that the ſame was there for ſome other lawful purpoſe. And it ſhall be lawful for ſuch magiſtrate or juſtice, out of the forfeiture, when recovered, to cauſe the offender's name, place of abode, and offence, to be publiſhed in ſome newſpaper printed or publiſhed in or near the county, city, or place, where ſuch offence ſhall have been committed [a]. If any perſon ſhall obſtruct or hinder ſuch ſearch, or the ſeizure of any bread or ingredients as aforeſaid, he ſhall forfeit not exceeding 5l. nor leſs than 20s [b].

Penalty of obſtructing ſearch.

Perſon intereſted not to act as a magiſtrate. No perſon who ſhall follow or be concerned in the buſineſs of a miller, mealman, or baker, ſhall act as a magiſtrate or juſtice in the execution of this act, on pain of 50l. to him who will inform and ſue for the ſame in any court of record at Weſtminſter [c]. If any perſon who ſhall follow the trade of a baker, ſhall make complaint to any magiſtrate or juſtice, and make appear to him, by the oath of any credible witneſs, that any offence which he hath been charged with, and for which he ſhall have paid any penalty by this act, ſhall have been occaſioned by the wilful neglect or default of any journeyman or other ſervant employed by him, ſuch magiſtrate or juſtice ſhall iſſue his warrant to bring ſuch journeyman or ſervant before himſelf, or any magiſtrate or juſtice of the place where the offender can be found; and on his being apprehended and brought before ſuch magiſtrate or juſtice,

Journeyman offending.

[a] § 30.
[b] § 31.
[c] § 32.

the ſaid magiſtrate or juſtice ſhall examine into the matter of ſuch complaint, and on proof thereof, upon oath, ſhall, under his hand, adjudge and order what reaſonable ſum ſhall be paid by ſuch journeyman or ſervant to his maſter, by way of recompence for the money he ſhall have paid by reaſon of the wilful neglect or default of ſuch journeyman or ſervant. And if he ſhall neglect or refuſe, on conviction, to pay immediately, ſuch magiſtrate or juſtice ſhall commit him to the houſe of correction, or ſome other priſon, of the place where he ſhall be apprehended or convicted, to be kept to hard labour, not exceeding one kalendar month, unleſs payment thereof ſhall be made after ſuch commitment, and before the expiration of the ſaid term of one kalendar month [a]. §2. ASSIZE.

Manner of convicting offenders.

IT ſhall be lawful for the mayor of London, or any alderman thereof, within the ſaid city or liberties; and for one juſtice, within the ſeveral counties, ridings, diviſions, cities, towns corporate, boroughs, liberties, or juriſdictions, to hear and determine, in a ſummary way, all offences againſt this act; and for that purpoſe to ſummon before him the party accuſed; and if he ſhall not appear, or offer ſome reaſonable excuſe for his default, then on oath made of the offence by one witneſs, ſuch magiſtrate or juſtice ſhall iſſue his warrant for apprehending the offender: and on appearance of the party accuſed, or if he ſhall not appear, on notice being given to or left for him at his uſual place of abode; or if he cannot be apprehended on a warrant granted againſt him as aforeſaid, ſuch magiſtrate or juſtice ſhall proceed to inquire of the offence, and to examine any witneſs or witneſſes who ſhall be offered on either ſide upon oath, and ſhall convict or acquit the party accuſed: and if the penalty, on ſuch conviction, ſhall not be paid within twenty-four hours after ſuch conviction, ſuch magiſtrate or juſtice ſhall iſſue his

[a] § 33.

§ 2. ASSIZE. warrant, directed to any peace-officer, to make diſtreſs; if any offender ſhall convey away his goods out of the ju diction of ſuch magiſtrate or juſtice, or ſo much thereof the penalty cannot be levied, then ſome magiſtrate or tice within whoſe juriſdiction the offenders ſhall have moved his goods ſhall back the ſaid warrant, and theret the penalty ſhall be levied by diſtreſs; and if within days the forfeiture ſhall not be paid, the diſtreſs ſhall be praiſed and ſold, rendering the overplus, after deducting forfeiture and the coſts, and charges of the proſecution, ſtreſs, and ſale; which charges ſhall be aſcertained by magiſtrate or juſtice before whom the offender was con ed, or who backed the warrant, if either of them ſhall tinue alive, and if not, then by ſome other magiſtrate or tice where the offender was convicted; and for want of diſtreſs, every ſuch magiſtrate or juſtice within whoſe j diction ſuch offender ſhall reſide or be, ſhall, on applic of the proſecutor, and proof made of the conviction non-payment of the penalty and charges, commit ſuch fender to the common gaol or houſe of correction of th viſion or place where the offender ſhall be found, there t main for one kalendar month from the time of ſuch com ment, unleſs payment ſhall be ſooner made [a].

AND if it ſhall be made out on oath, to the ſatisfactio any magiſtrate or juſtice, that any one is likely to give m terial evidence on behalf of the proſecutor or of the pe accuſed, and will not voluntarily appear to be exami ſuch magiſtrate or juſtice ſhall iſſue his ſummons to com ſuch witneſs before him, at ſuch reaſonable time as in ſummons ſhall be fixed: and if any perſons ſo ſumm ſhall neglect or refuſe to appear, and no juſt excuſe ſha offered for ſuch neglect or refuſal, then (after proof, oath of ſuch ſummons) ſuch magiſtrate or juſtice ſhall

[a] § 4.

his warrant to bring ſuch witneſs before him; and if, on his appearance, or on being brought before ſuch magiſtrate or juſtice, he ſhall refuſe to be examined on oath, without offering any juſt excuſe for ſuch refuſal, ſuch magiſtrate or juſtice may commit him to the public priſon of the county, city, or other diviſion, in which the perſon ſo refuſing to be examined ſhall be, there to remain not exceeding fourteen days, nor leſs than three, as ſuch magiſtrate or juſtice ſhall direct [a]. § 2. ASSIZE.

AND the conviction ſhall be in the form or to the effect following: Form of the conviction.

——*To-wit. Be it remembered, that on this day of in the year of the reign of* A O *is convicted before me, one of his majeſty's juſtices of the peace for the ſaid county of for and I do adjudge him to pay and forfeit for the ſame the ſum of*

Given under my hand and ſeal the day and year aforeſaid [b].

BY a general clauſe in this ſame act [c], all penalties and forfeitures, when recovered, ſhall be paid to the informer. Application of the forfeitures.

BUT by the 32 Geo. II, c. 18, ſuch of the penalties by the aforeſaid act, as thereby are not *particularly* diſpoſed of, ſhall be applied, one moiety thereof, where any offender ſhall be convicted by confeſſion, or oath of one witneſs, to him who ſhall inform and proſecute; and the other moiety thereof, and alſo all penalties and forfeitures incurred on the weighing, trying, or ſeizure, of any bread by any magiſtrate or juſtice, to the better carrying the ſaid act into execution, as ſuch magiſtrate or juſtice ſhall think fit [d].

NO certiorari, letters of advocation, or of ſuſpenſion, ſhall Advocation

[a] § 35.
[b] § 36.
[c] § 34.
[d] § 2.

§ 2. ASSIZE. be granted, to remove any conviction, or other proceeding had thereupon [a].

Appeal. IF any perſon convicted ſhall think himſelf aggrieved, he may appeal to the next ſeſſions, and the execution ſhall in ſuch caſe be ſuſpended; ſuch perſon convicted entering into recognizance, at the time of the conviction, with two ſufficient ſureties, in double the ſum which he ſhall have been adjudged to forfeit, upon condition to proſecute ſuch appeal with effect, and to be forthcoming to abide the judgment and determination of the juſtices at the ſaid ſeſſions, who ſhall finally determine the matter of the ſaid appeal, and award ſuch coſts as to them ſhall appear juſt and reaſonable, to be paid by either party: and if the conviction ſhall be affirmed, the appellant ſhall immediately pay down the ſum adjudged, together with ſuch coſts as the juſtices in their ſaid ſeſſions ſhall award; and in default of payment thereof, any two ſuch juſtices, or any one magiſtrate or juſtice having juriſdiction in the place to which ſuch appellant ſhall eſcape, or where he ſhall reſide, ſhall commit him to the common gaol of the county, city, diviſion, or place, where he ſhall be apprehended, until he ſhall make payment of ſuch penalty and of the coſts and charges which ſhall be adjudged on the conviction, to the informer: but if the appellant ſhall be diſcharged, reaſonable coſts ſhall be awarded to him againſt the informer, who would, in caſe of ſuch conviction, have been entitled to a ſhare of the penalty; and which coſts ſhall and may be recovered by the appellant againſt ſuch informer, in like manner as coſts given at the ſeſſions are recoverable [b]. Provided, that if the conviction ſhall be within ſix days before the ſeſſions, the party, on entering into ſuch recognizance as aforeſaid, ſhall be at liberty to appeal, either to the then next, or to the next following ſeſſions [c]. Every action

[a] 31 Geo. II, c. 29, § 37.
[b] § 38.
[c] § 39.

§ 2. ASSIZE.

which ſhall be brought againſt any magiſtrate, juſtice, or peace-officer, for any thing done under this act, ſhall be commenced within ſix months, and laid in the proper county; and the act of 24 Geo. II, c. 44, ſhall extend to ſuch magiſtrate or juſtice acting under this act. And no action ſhall be commenced againſt ſuch peace-officer, till ſeven days after notice in writing ſhall have been given to or left for him at his uſual place of abode by the proſecutor's attorney; which notice ſhall contain the name and place of abode of the perſon intending to bring ſuch action, and alſo of his attorney, and likewiſe the cauſe of action: and ſuch peace-officer may within the ſaid ſeven days tender ſatisfaction; and if the ſame is not accepted, the defendant may plead ſuch tender in bar of the action, together with the general iſſue, or any other plea, with leave of the court; and if the jury ſhall find the amends tendered to have been ſufficient, or if the plaintiff ſhall be nonſuit, or diſcontinue, or judgment be given for the defendant upon demurrer, or if the action be brought after the time limited, or not within the proper county, the jury ſhall find for the defendant, and he ſhall be entitled to his coſts; but if the jury ſhall find that no ſuch tender was made, or not ſufficient, or ſhall find againſt the defendant on any plea pleaded, they ſhall give a verdict for the plaintiff, and ſuch damages as they ſhall think proper, and the plaintiff ſhall thereupon recover his coſts againſt ſuch defendant [a].

Indemnity of perſons proſecuted for any thing done on this act.

And other perſons ſued for any thing done on this act, may plead the general iſſue [b]; and if they recover ſhall have treble coſts [c]. Provided always, that no perſon ſhall be convicted for any of the aforeſaid offences, unleſs the proſecution be commenced within three days after the offence committed [d]. Provided alſo, that nothing herein ſhall extend to

Limitation of actions.

[a] § 40.

[b] This relates to a peculiarity of the Engliſh practice. See explanation of technical terms at the end of the volume.

[c] § 41.

[d] § 42.

§ 2. ASSIZE. Saving of the right of others.

prejudice any right or cuſtom of the city of London; or of the lord of any leet; or clerk of the market; or the dean of Weſtminſter, or high ſteward of Weſtminſter, or his deputy, or of the univerſities [a].

Proceedings where the aſſize hath not been ſet.

ALL that hath been ſaid above, as to the price and weight of bread, and the like, proceeds upon the ſuppoſition of an aſſize being ſet. By the 3 Geo. III, c. 11, regulations are made, although no aſſize be ſet, and further proviſions are enacted, as followeth:

§ 3. IF NO ASIZE.

III. No loaf or loaves of bread, called or deemed aſſize loaf or loaves in the table of the aſſize and price of bread in the act of the 31 Geo. II, c. 29, and the weight of which varies according to the variation in the price of grain, ſhall be made for or expoſed to ſale, in any place where loaves called

[a] § 43, 44, 45.

" Note.—The reaſon why the " indemnifying ſtatute of the 24 Geo. " II, c. 44, is here particularly mentioned, ſeems to be upon the account " of ſuch magiſtrates or chief officers " who are empowered to act in ſetting the aſſize, and otherwiſe carrying this act into execution, that " are not juſtices of the peace; as, " for inſtance, the court of mayor " and aldermen, in moſt of the boroughs and towns corporate, conſiſteth of perſons ſome of whom are " not juſtices; and in others, eſpecially the more ancient, not one of " them is a juſtice of the peace " (the corporation having been eſtabliſhed before there were any juſtices of the peace in the kingdom): " but yet they are enabled ſpecially to proceed in this and in many " other inſtances by act of parliament. Which obſervation is applicable alſo to the power herein " given to them, to iſſue precepts, to " examine upon oath, and the like; " which power is implied in the general office of a juſtice of the peace, " but is not applicable to thoſe others " without ſpecial words granting the " ſame. So alſo it was neceſſary for " the act to be particular, with regard to the indemnification of conſtables and others acting under " ſuch warrants; as alſo of the meal-" weighers, clerks of the market, " and others appointed to make returns of the price of grain, flour, " and the like, who are not under " the general protection of the law " for their proceedings in theſe matters, and therefore require an expreſs declaration in the act itſelf of " their authority and privilege in " this reſpect." Burn.

prized loaves in the ſaid tables, ſhall be allowed to be ſold at the ſame time; that is to ſay, no aſſize loaves of the price of three pence, and prized loaves called half quartern loaves, nor aſſize loaves of the price of ſix pence, and prized loaves called quartern loaves, nor aſſize loaves of the price of twelve pence, and prized loaves called half peck loaves, nor aſſize loaves of the price of eighteen pence, and prized loaves called peck loaves, ſhall at the ſame time in any place be made for or expoſed to ſale, to the end that unwary perſons may not be impoſed on by buying aſſize loaves for prized loaves, or prized loaves for aſſize loaves; on pain that every perſon offending ſhall forfeit not exceeding 40s. nor leſs than 10s[a].

§ 3. If no assize.

Assized and prized loaves not ſold at once.

And the juſtices in their general, quarter, or petty ſeſſions, may from time to time appoint, which of the ſorts of aſſize or prized loaves, and what other ſorts of bread, and what ſorts of grain, ſhall be allowed to be made and ſold within their juriſdiction, or any part thereof: their order to be entered in a book, which may be inſpected by the makers of bread for ſale at all ſeaſonable times of the day, without fee; and they ſhall cauſe a copy thereof to be put up in ſome market, or other public town of the place, or elſe be inſerted in ſome public newſpaper circulated there. Provided, that the juſtices ſhall not at any time allow the making for ſale, or ſelling any ſorts of aſſize bread made of the flour of wheat, other than wheaten and houſehold bread, and loaves of white bread of the price of two pence or under[b].

Juſtices to appoint from time to time the ſorts of bread and grain to be ſold.

And every maker of bread for ſale ſhall obſerve the ſame proportion as to weight, as where the aſſize is ſet; that is to ſay, every white loaf of the price of two pence, or under, ſhall weigh three parts in four of the weight of the wheaten

Proportion of weight to be obſerved.

[a] 3 Geo. III, c. 11, § 1. [b] Ibid. § 2, 3.

§ 2. ASSIZE. bread, ſhall, on conviction by confeſſion, or oath of one witneſs before any ſuch magiſtrate or juſtice, forfeit not exceeding 10l. nor leſs than 40s. unleſs the party charged with ſuch offence ſhall make it appear to the ſatisfaction of ſuch magiſtrate or juſtice, that ſuch mixture or ingredient was not brought or lodged where the ſame was ſeized, with deſign to have been put into any meal or flour, or to have adulterated the purity thereof, but that the ſame was there for ſome other lawful purpoſe. And it ſhall be lawful for ſuch magiſtrate or juſtice, out of the forfeiture, when recovered, to cauſe the offender's name, place of abode, and offence, to be publiſhed in ſome newſpaper printed or publiſhed in or near the county, city, or place, where ſuch offence ſhall have been committed [a]. If any perſon ſhall obſtruct or hinder ſuch ſearch, or the ſeizure of any bread or ingredients as aforeſaid, he ſhall forfeit not exceeding 5l. nor leſs than 20s [b].

Penalty of obſtructing ſearch.

Perſon intereſted not to act as a magiſtrate. No perſon who ſhall follow or be concerned in the buſineſs of a miller, mealman, or baker, ſhall act as a magiſtrate or juſtice in the execution of this act, on pain of 50l. to him who will inform and ſue for the ſame in any court of record at Weſtminſter [c]. If any perſon who ſhall follow the trade of a baker, ſhall make complaint to any magiſtrate or juſtice, and make appear to him, by the oath of any credible witneſs, that any offence which he hath been charged with, and for which he ſhall have paid any penalty by this act, ſhall have been occaſioned by the wilful neglect or default of any journeyman or other ſervant employed by him, ſuch magiſtrate or juſtice ſhall iſſue his warrant to bring ſuch journeyman or ſervant before himſelf, or any magiſtrate or juſtice of the place where the offender can be found; and on his being apprehended and brought before ſuch magiſtrate or juſtice

Journeyman offending.

[a] § 30.
[b] § 31.
[c] § 32.

EVERY wheaten loaf ſhall be marked with a large Roman W; houſehold with a large Roman H; and if any perſon ſhall ſell or offer to ſale any ſuch loaf unmarked (except as to ſuch loaves which ſhall be raſped by the deſire of the purchaſer for his own uſe), he ſhall forfeit for every ſuch loaf, a ſum not exceeding 40s. nor leſs than 10s; unleſs it ſhall appear to the ſatisfaction of the juſtice to whom complaint ſhall be made, that the not marking aroſe from ſome unavoidable accident, or was occaſioned by ſome contrivance or confederacy [a]. § 3. IF NO ASSIZE. Marking.

AND bread made of any other grain than wheat ſhall be marked with ſome letter or letters, not more than two, as the juſtices in their general, quarter, or ſpecial, ſeſſions, ſhall order; which order ſhall be entered in a book, to which the bakers may reſort in the day-time without fee; and the juſtices ſhall cauſe a copy thereof to be put up in ſome market, or other public town or place within the diviſion, or otherwiſe to be inſerted in ſome public newſpaper uſually circulated there: and if the juſtices ſhall neglect to make ſuch order, then the baker ſhall mark every ſuch loaf with any two diſtinct capital letters as he ſhall think fit. And every perſon who ſhall make or have in his cuſtody for ſale any ſuch loaf made of other grain than wheat, which ſhall not be ſo marked, ſo as the ſame may, on view thereof, be aſcertained under what denomination it was made (except ſuch loaves as ſhall be raſped by the deſire of the purchaſer for his own uſe), ſhall forfeit a ſum not exceeding 40s. nor leſs than 5s. for every loaf not ſo marked [b]. Marking of bread of other grain.

AND it ſhall be lawful for any juſtice, or peace-officer, authorized by warrant of ſuch juſtice, to enter into any houſe, Power to enter into any ſhop.

[a] 3 Geo. III, c. 11, § 8.

[b] § 9. This of the marking would ſeem to be ſuperſeded by 41 Geo. III, (U. K.) c. 12.

§ 3. IF NO ASSIZE.

ſhop, ſtall, bakehouſe, warehouſe, outhouſe, or other p of or belonging to any baker or ſeller of bread; an ſearch, view, weigh, and try, all or any bread which be there found: and if any bread ſhall, on any ſearch or by any juſtice, or on proof made before him by the oa one witneſs, be found to be deficient in weight, or not marked, or deficient in the due baking or working the or wanting in the goodneſs of the ſtuff, or made wit mixture of meal or flour of any other grain than the ſhall import to be made with, or with any larger or proportion of any other grain than what ought to be therein, or with any mixture or ingredient which by aforeſaid act ought not to be put therein, or with any ti in lieu of flour which ſhall not be the genuine flour the ſ ſhall import to be, or made with any leaven not allowed the ſaid former act; ſuch juſtice or peace-officer may the ſame, and diſpoſe thereof to poor perſons as to ſuch tice ſhall ſeem fit; and the maker or ſeller, whoſe b ſhall be found wanting in the goodneſs of the ſtuff, or n with ſuch undue mixture as aforeſaid, or undue propor or made with any thing in lieu of flour which ſhall not b genuine flour the ſame ſhall import to be, or with any le not allowed by the ſaid act, ſhall forfeit a ſum not exc ing 5l. nor leſs than 20s.; unleſs the default ſhall appe have wholly ariſen from ſome unavoidable accident, or contrivance or confederacy [a]. And if any perſon ſhall ſtruct or oppoſe any ſuch ſearch, or ſeizure of ſuch brea ſhall forfeit a ſum not exceeding 40s. nor leſs than 20s[b]. no perſon, who ſhall follow or be concerned in the buſ of a miller, mealman, or baker, ſhall be capable of actin a juſtice in the execution of this act; and if he ſhall ſume ſo to do, he ſhall forfeit 50l. to him who ſhall in or ſue for the ſame [c]. Provided, that if the baker

[a] 3 Geo. III, c. 11, § 10.
[b] § 11.
[c] § 12.

make it appear to any juſtice, that any offence for which he ſhall have paid the penalty, was occaſioned by the neglect or default of his journeyman or ſervant, the ſaid juſtice ſhall iſſue his warrant for bringing ſuch offender before him or ſome other juſtice; and, on conviction, ſuch juſtice ſhall order what reaſonable ſum ſhall be paid by the ſaid offender by way of recompence; and if he do not immediately pay the ſame, the ſaid juſtice ſhall commit him to the houſe of correction, or other priſon of the place where he ſhall be apprehended, there to be kept to hard labour for any time not exceeding one kalendar month, unleſs payment be ſooner made [a]. § 3. IF NO ASSIZE.

And one juſtice may hear and determine offences in like manner as by the ſaid former act [b]. And no certiorari, letters of advocation, or ſuſpenſion, ſhall be granted, to remove any conviction or other proceedings had thereupon [c]. With the liberty of appeal as by the ſaid former act [d]. And perſons convicted on this act, ſhall not be proſecuted for the ſame offence under any other law [e]. And all penalties and forfeitures on this act ſhall go, half to the informer, and half as the juſtice ſhall order for carrying this act into execution [f]. Finally, it is provided that nothing herein ſhall extend to the univerſities [g].

The 13 Geo. III, c. 62 [h], on the narrative, that by the 31 Geo. II, c. 29, and 3 Geo. III, c. 11, only two ſorts of § 4. GEO. III, 13, c. 62, —STANDARD W. BREAD.

[a] 3 Geo. III, c. 11, § 13.
[b] § 14, 15.
[c] § 17.
[d] § 18, 19.
[e] § 23.
[f] § 24.
[g] § 25.
[h] This ſtandard bread is ſaid, by learned inquirers, to be the moſt nutritive, moſt adviſable, and moſt ancient, of any: in its calculation as to the wheaten and houſehold, the 31 Geo. II, ſuppoſes the conſumption of both equal. If the houſehold be in greater demand, the bakers complain they loſe; if the wheaten, again, the public. This inconvenience is avoided, and the greateſt nouriſhment drawn from the grain, by preparing it for the ſtandard bread.

§ 4. GEO. III, 13, c. 62, —STANDARD W. BREAD.

bread made of wheat are allowed to be made for ſale; th is to ſay, Wheaten and Houſehold: and whereas, accordi to the antient order and cuſtom of the realm, there ha been from time immemorial a STANDARD WHEATEN BREA being the whole produce of the wheat whereof it was mad

Standard, of what it conſiſts?

therefore enacted, that from henceforth a bread made of t flour of wheat, which flour, without any mixture or diviſi ſhall be the whole produce of the grain, the bran or h thereof only excepted, and which ſhall weigh three fou parts of the weight of the wheat whereof it ſhall be ma may be made and ſold, and ſhall be called and underſtood be a *ſtandard wheaten bread*[a].

Marking.

AND the maker ſhall mark every loaf thereof with the pital letters S W, and the ſame may be made and ſold, though no aſſize be ſet, of the weight and in the proporti following; viz. that every ſtandard wheaten peck loaf ſh weigh 17 lb. 6 oz. avoirdupois; every half peck loaf 8 11 oz.; and every quartern loaf 4 lb. 5½ oz.: and every pe loaf, half peck loaf, and quartern loaf, ſhall always be f as to price in proportion to each other reſpectively: and t when wheaten and houſehold bread, made as the law direc ſhall be ſold at the ſame time, together with this ſtanda wheaten bread, they be ſold in reſpect of and in proporti to each other, as followeth; namely, that the ſame weig of wheaten bread, which coſts 8d. the ſame weight of t ſtandard wheaten bread ſhall coſt 7d. and the ſame weig of houſehold bread ſhall coſt 6d. or ſeven ſtandard whea aſſized loaves ſhall weigh equal to eight wheaten aſſiz loaves, or to ſix houſehold aſſized loaves of the ſame pri as near as may be[b]. Provided, that the ſaid ſtandard whe en bread ſhall not be made into or expoſed to ſale as pri loaves, at one and the ſame time, together with aſſized loa of the ſame ſtandard wheaten bread[c]. And the magiſtra

[a] 13 Geo. III, c. 62, § 1. [b] § 2. [c] § 3.

may, whenever they think proper, fix the aſſize of this ſtand- and wheaten bread, according to the following tables[a]: § 4. GEO. III, 13, c. 62, —STANDARD W. BREAD.

[a] TABLE I,—Or the aſſize-table of ſtandard wheaten bread.

The firſt column contains the price of the buſhel of wheat, Wincheſter meaſure, from 2s. 9d. to 14s. 6d. the buſhel, the allowance of the magiſtrates the baker included: the other columns contain the *weight* of the ſeveral ſorts.

Price of buſhel of wheat and baking.	SMALL BREAD.			LARGE ASSIZE BREAD.								
	Penny			Two pence.			Sixpence			Twelve pence.			Eighteen pence.		
s. d.	oz.	dr.		lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.	lb.	oz.	dr.
2 9	25	4		3	2	9	9	7	11	18	15	5	28	7	0
3 0	23	3		2	14	5	8	11	0	17	6	1	26	1	1
3 3	21	6		2	10	12	8	0	5	16	0	11	24	1	0
3 6	19	14		2	7	12	7	7	3	14	14	5	22	5	8
3 9	18	9		2	5	1	6	15	4	13	14	7	20	13	11
4 0	17	6		2	2	12	6	8	4	13	0	9	19	8	13
4 3	16	6		2	0	11	6	2	2	12	4	4	18	6	7
4 6	15	7		1	14	4	5	12	11	11	9	6	17	6	1
4 9	14	10		1	13	4	5	7	13	10	15	10	16	7	7
5 0	13	14		1	11	13	5	3	7	10	6	13	15	10	4
5 3	13	4		1	10	8	4	15	7	9	14	14	14	14	5
5 6	12	10		1	9	4	4	11	13	9	7	11	14	3	8
5 9	12	1		1	8	3	4	8	9	9	1	1	13	9	10
6 0	11	9		1	7	3	4	5	8	8	11	1	13	0	9
6 3	11	2		1	6	4	4	2	12	8	5	8	12	8	3
6 6	10	11		1	5	6	4	0	3	8	0	5	12	0	8
6 9	10	5		1	4	10	3	13	13	7	11	9	11	9	6
7 0	9	15		1	3	14	3	11	9	7	7	3	11	2	12
7 3	9	9		1	3	3	3	9	8	7	3	1	10	12	9
7 6	9	4		1	2	9	3	7	10	6	15	4	10	6	13
7 9	9	0		1	1	15	3	5	13	6	11	10	10	1	7
8 0	8	11		1	1	6	3	4	2	6	8	4	9	12	7
8 3	8	7		1	0	14	3	2	9	6	5	2	9	7	11
8 6	8	3		1	0	6	3	1	1	6	2	2	9	3	3
8 9	7	15		0	15	14	2	15	11	5	15	5	8	15	0
9 0	7	12		0	15	7	2	14	5	5	12	11	8	11	0
9 3	7	8		0	15	0	2	13	1	5	10	3	8	7	4
9 6	7	5		0	14	10	2	11	14	5	7	13	8	3	11
9 9	7	2		0	14	4	2	10	12	5	5	9	8	0	15
10 0	6	15		0	13	14	2	9	11	5	3	7	7	13	2
10 3	6	13		0	13	9	2	8	11	5	1	6	7	10	1
10 6	6	10		0	13	4	2	7	12	4	15	7	7	7	3
10 9	6	7		0	12	15	2	6	13	4	13	10	7	4	6
11 0	6	5		0	12	10	2	5	15	4	11	13	7	1	12
11 3	6	3		0	12	6	2	5	1	4	10	2	6	15	4
11 6	6	1		0	12	1	2	4	4	4	8	9	6	12	13

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AND the bakers and ſellers of the ſaid ſtandard wh bread ſhall be liable to all the penalties of the former

11	9	5	15	0	11	13	2	3	8	4	7	0	6	10	8
12	0	5	13	0	11	9	2	2	12	4	5	8	6	8	4
12	3	5	11	0	11	6	2	2	1	4	4	2	6	6	2
12	6	5	9	0	11	2	2	1	6	4	2	12	6	4	2
12	9	5	7	0	10	14	2	0	11	4	1	7	6	2	2
13	0	5	6	0	10	11	2	0	1	4	0	3	6	0	4
13	3	5	4	0	10	8	1	15	8	3	14	15	5	14	7
13	6	5	2	0	10	5	1	14	14	3	13	13	5	12	1
13	9	5	1	0	10	2	1	14	5	3	12	11	5	11	0
14	0	4	15	0	9	15	1	13	13	3	11	9	5	9	6
14	3	4	14	0	9	12	1	13	4	3	10	9	5	7	13
14	6	4	13	0	9	9	1	12	12	3	9	8	5	6	5

TABLE II,—Or the price-table of ſtandard wheaten bread.

The firſt column contains the price of the buſhel of wheat, allowa the baker included: the other columns contain the *prices* of the loaves.

Price of buſhel of wheat and baking.		Quartern Loaf.		Half peck Loaf.		Peck Loaf.		Price of buſhel of wheat and baking.		Quartern Loaf.		Half Peck Loaf.		Peck Loaf.	
s.	d.	s.	d.	s.	d	s.	d.	s.	d.	s.	d.	s.	d.	s.	d.
2	9	0	2¾	0	5½	0	11	8	9	0	8¼	1	5½	2	11
3	0	0	3	0	6	1	0	9	0	0	9	1	6	3	0
3	3	0	3¼	0	6½	1	1	9	3	0	9¼	1	6½	3	1
3	6	0	3½	0	7	1	2	9	6	0	9½	1	7	3	2
3	9	0	3¾	0	7½	1	3	9	9	0	9¾	1	7½	3	3
4	0	0	4	0	8	1	4	10	0	0	10	1	8	3	4
4	3	0	4¼	0	8½	1	5	10	3	0	10¼	1	8½	3	5
4	6	0	4½	0	9	1	6	10	6	0	10½	1	9	3	6
4	9	0	4¾	0	9½	1	7	10	9	0	10¾	1	9½	3	7
5	0	0	5	0	10	1	8	11	0	0	11	1	10	3	8
5	3	0	5¼	0	10½	1	9	11	3	0	11¼	1	10½	3	9
5	6	0	5½	0	11	1	10	11	6	0	11½	1	11	3	10
5	9	0	5¾	0	11½	1	11	11	9	0	11¾	1	11½	3	11
6	0	0	6	1	0	2	0	12	0	1	0	2	0	4	0
6	3	0	6¼	1	0½	2	1	12	3	1	0½	2	0½	4	1
6	6	0	6½	1	1	2	2	12	6	1	0½	2	1	4	2
6	9	0	6¾	1	1½	2	3	12	9	1	0¾	2	1½	4	3
7	0	0	7	1	2	2	4	13	0	1	1	2	2	4	4
7	3	0	7¼	1	2½	2	5	13	3	1	1½	2	2½	4	5
7	6	0	7½	1	3	2	6	13	6	1	1½	2	3	4	6
7	9	0	7¾	1	3½	2	7	13	9	1	1¾	2	3½	4	7
8	0	0	8	1	4	2	8	14	0	1	2	2	4	4	8
8	3	0	8¼	1	4½	2	9	14	3	1	2¼	2	4½	4	9
8	6	0	8½	1	5	2	10	14	6	1	2¼	2	5	4	10

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provided, that if any information be laid againſt a baker, for making, marking, or expoſing to ſale, any bread purporting to be the ſtandard wheaten bread aforeſaid, made of flour, not being the whole produce of the wheat, the bran or hull thereof only excepted, and weighing three fourth parts of the weight of the wheat whereof it was made, and ſhall prove that he bought the ſaid flour, as and for ſuch flour, of the miller or mealman, naming his name and place of abode; in ſuch caſe the baker ſhall be acquitted, and the miller or mealman ſhall forfeit as in the caſe of adulterating corn, meal, or flour, by the ſaid act [a].

Regulations for procuring good ſtandard wheaten bread.

AND when the magiſtrates have ſet the aſſize of the ſaid ſtandard wheaten bread, they may, if they think proper, omit ſetting the aſſize of any other ſort of bread [b]. And the juſtices, at any general or quarter ſeſſions, may prohibit, for three months, (unleſs they ſhall ſee cauſe ſooner to revoke the prohibition, which they may do at any adjourned quarter ſeſſions or any ſpecial ſeſſions), the makers of bread for ſale, for making or expoſing to ſale any other one or more ſorts of bread, purporting to be of a ſuperior quality, and ſold at a higher price, than the ſtandard wheaten bread aforeſaid. Provided, that no ſuch order of prohibition ſhall take place, until one kalendar month at leaſt after the date of the making thereof. And ſuch order ſhall be entered by the ſaid juſtices in a book, to be inſpected by the bakers at all ſeaſonable times in the day time, without fee. And the juſtices ſhall cauſe a copy of ſuch order to be put up in ſome market or other public town within the diſtrict, or ſhall cauſe the ſame to be inſerted in ſome public newſpaper publiſhed within ſuch diſtrict. And provided, that the bakers may have an opportunity, whilſt the ſaid prohibition is under conſideration, of offering to the juſtices their objections

Magiſtrates may for three months prohibit the making of other than ſtandard.

[a] 31 Geo. II, c. 29, § 5, 6.

[b] 13 Geo. III, c. 62, § 7.

§ 5. GEO. III, 13, c. 62, —STANDARD W. BREAD.

againſt it [a]. Provided alſo, that nothing herein ſhall extend to prevent the magiſtrates or others who have power to ſet the aſſize of bread, from allowing (even during the time of ſuch prohibition as aforeſaid), if they think fit, any white loaves or wheaten loaves of the price of one penny or two pence to be made and ſold, ſo that they be made, marked and ſold, according to the regulations of the aſſize table of 10.

AND whereas in many places the inferior claſſes of people are uſed to be ſupplied with bread made of wheat, of a coarſe and cheaper ſort than the ſtandard wheaten bread aforeſaid; therefore, it ſhall be lawful for the baker to make and ſell ſuch inferior and coarſer bread, provided he ſells the ſame at a price under that of houſehold bread, as directed by the ſaid act of 31 Geo. II, (although nothing in this act extends to ſetting any aſſize thereon). But if he ſells ſuch inferior or coarſer bread by weights and prices at which the houſehold bread aforeſaid is at this time aſſized, he ſhall be liable to the ſame penalties as bakers for any miſdemeanor in making and ſelling any other ſort of bread [b]. Provided always, that nothing herein ſhall extend to prejudice any right or cuſtom of the city of London, or the dean of the collegiate church of Weſtminſter, or the high ſteward of the city of Weſtminſter, or either of the two univerſities [c].

§ 5. ASSIZE IN SCOTLAND.

SUCH are the laws reſpecting the aſſize of bread, as ſtated by Dr. Burn, with the additional notice of ſome enactments ſubſequent to the laſt edition of that work [d]. Which enactments conſtitute a code of law, in general, obligatory over

[a] 13 Geo. III, c. 62, § 8, 9.
[b] § 11, 12.
[c] § 14, 15, 16, 17.
[d] It did not ſeem neceſſary to notice mere temporary regulations, as the prohibition to eat new bread (41 Geo. III, c. 17, repealed by 46 Geo. III, c. 4.)

the kingdom; but in ſome particulars they have been varied in their application to this country. § 5. ASSIZE IN SCOTLAND.

THUS, as there are here fewer markets for grain, a different method is appointed for fixing the price; 3 Geo. III, c. 6, enacts, it ſhall and may be lawful, in that part of Great Britain called Scotland, for the magiſtrates and juſtices of the peace, who are by the ſaid act authorized to ſet the aſſize of bread, from time to time, and ſo often as they ſhall judge proper, within their reſpective juriſdictions, to inquire into and take proof of the prices which the ſeveral ſorts of grain, meal, and flour, fit and proper to make the ſeveral ſorts of bread which ſhall be allowed to be made by them, ſhall, *bona fide*, ſell for in the public markets in or near the city, borough, or place, for which they are reſpectively authorized to ſet the aſſize of bread; or where there are no public markets for any particular ſpecies of grain, meal, or flour, in or near ſuch city, borough, or place, to inquire into and take proof of the preſent or laſt ſelling price of ſuch ſpecies of grain, meal, or flour, whether of the growth of the country, or brought from diſtant places; to which ſelling price or prime coſt ſhall be added ſuch an allowance for the expence and riſk of carriage or tranſportation, as from the inquiry and proof ſhall, to the ſaid magiſtrates and juſtices of the peace, appear juſt and reaſonable; ſo as that the price of ſuch grain, meal, or flour, be from time to time aſcertained, according to what thoſe ſeveral ſpecies do, or may truly coſt the bakers, before they can manufacture the ſame into bread.

Magiſtrates and juſtices to inquire into, and take proof of, the prices which the ſeveral ſorts of bread, corn, meal, and flour, ſell for in the public markets,

and where there are no public markets, then to take proof of the preſent or laſt ſelling price thereof; ſo as to aſcertain the price the ſame coſts the baker;

BY ſection ſecond it is further enacted, that, previous to the proof to be taken in the ſeveral caſes aforeſaid, notice in writing ſhall be given to the deacon of the incorporation of bakers, or where there is no ſuch incorporation, to any two reputable bakers within the city, borough, or place, where ſuch proof is to be taken, forty-eight

they giving previous notice to the deacon of the bakers company, &c.

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hours at leaſt before taking the ſame, to the end that the makers of bread within ſuch city, borough, or place, may, if they think proper, attend the taking ſuch proof, and ſuggeſt ſuch queſtions as may be proper to be put to the witneſſes ſummoned by the magiſtrates or juſtices of the peace reſpectively, or offer ſuch other witneſſes or evidence as may appear proper for proving the prices of the grain, meal, or flour in queſtion.

The proof to proceed upon the oaths of two witneſſes converſant in the prices;

AND the third ſection provides, that ſuch proof ſhall only proceed upon the oaths of two or more credible witneſſes, converſant in the prices of the ſeveral ſorts of grain, meal, or flour, which ſhall be the ſubject of ſuch inquiry, or by writings legally proved; and that it ſhall and may be lawful to the ſaid magiſtrates and juſtices of the peace, within their reſpective juriſdictions, to ſummon ſuch perſon or perſons as to them ſhall appear moſt proper for that purpoſe, and to compel them to appear and give their evidence; and that either by ſuch remedies, and under ſuch penalties, as are provided by the ſaid act, in the caſe of perſons duly ſummoned to give evidence, touching the rates and prices of the ſeveral ſorts of grain, meal, and flour, where the return of the prices of ſuch grain, meal, or flour, ſhall be ſuſpected as not truly and *bona fide* made, or by ſuch remedies as are competent by the common law of Scotland, for compelling witneſſes to appear and give evidence in any judicial trial before a competent court.

who may be ſummoned, and compelled to appear, and give evidence;

ſo as they be not obliged to travel above five miles from home.

PROVIDED always, that the perſon or perſons ſo ſummoned be not obliged to travel above five miles from the place of his, her, or their, abode [a].

Evidence to be ingroſſed in a book,

BY ſection fifth it is further enacted, that the whole evidence to be taken as above, ſhall be fairly ingroſſed in a book, to be kept for that purpoſe, by the town-clerks of

[a] § 4.

:ording to the practice of the law of Scotland; and
often as ſuch proof ſhall be taken, the magiſtrates
ices of the peace, before whom the ſame ſhall be taken
:ively, ſhall, immediately after cloſing the evidence, or
ı as it can conveniently be done, declare the prices of
'eral kinds of grain, meal, or flour, concerning which
ıuiry has been made, according as theſe ſhall appear
ın to be proved, from conſidering the whole evidence;
hich declaration ſhall be ingroſſed in the book appoint-
ɔe kept as aforeſaid, immediately after the evidence,
ıall be ſigned by the magiſtrates or juſtices of the peace
tively, before whom ſuch proof ſhall be taken; and
. book containing the evidence and declaration afore-
hall be open and patent to the inſpection of the mak-
bread, and all other perſons, without fee or reward;
ıall, to all intents and purpoſes, be deemed and taken
equivalent to the returns or certificates of the market
; of all kinds of grain, meal, or flour, appointed to be
by the ſaid act: and the magiſtrates and juſtices of
eace in that part of Great Britain called Scotland, ſhall
upon proceed to ſet, aſcertain, and appoint, the aſſize
'eight of all ſorts of bread which ſhall be made for
or expoſed to ſale, and the price to be paid for the
within their reſpective juriſdictions, when, and as of-
from time to time, as they ſhall think fit, according to

and the reſpective prices to be declared,

and entered in the ſaid book, and ſigned by the magiſtrates;

which is to be free to public inſpection.

The aſſize and weight of bread for ſale, to be aſcertained according thereto.

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of bread ſhall be ſet, aſcertained, and appointed, for any city borough, or place, within that part of Great Britain called Scotland, by the magiſtrates or juſtices of the peace empowered for that purpoſe, ſuch aſſize ſhall not be limited to endure for any certain time, but ſhall continue and ſtand in force until a new aſſize of bread be ſet, aſcertained, and appointed, by the ſaid magiſtrates or juſtices of the peace, for ſuch city, borough, or place reſpectively; any thing in the aforeſaid act of the thirty-firſt year of the reign of his late majeſty, to the contrary notwithſtanding.

The aſſize not liable to be varied, but to continue in force till a new one is made.

Upon application and proof offered of a ſufficient variation of the price of any ſpecies of the ſaid grain, by any two inhabitants or bakers, ſince the laſt aſſize,

SECTION ſeventh further enacts, that upon an application in writing by any two or more of the inhabitants or bakers within any city, borough, or county, where ſuch aſſize of bread ſhall be ſet, to the magiſtrates or juſtices of the peace who ſet the laſt aſſize, or to the magiſtrates or juſtices of the peace of ſuch city, borough, or county, for the time being ſetting forth, and offering to prove, by proper evidence, that the price of any of the ſpecies of grain before mentioned have riſen or fallen ſince the laſt aſſize of bread was ſet, ſo as to authorize an alteration of ſuch laſt aſſize, according to the aforeſaid act of his late majeſty, and tables therein referred to; in every ſuch caſe, the magiſtrates or juſtices of the peace, to whom ſuch application ſhall be made, ſhall, within their reſpective juriſdictions, be obliged to take evidence of the then current prices, in the manner before directed; and if, upon adviſing ſuch proof, they ſhall find ſuch a variation of the prices ſince the laſt aſſize, as deſcribed in the ſaid act they ſhall immediately ſet and aſcertain a new aſſize of bread which ſhall remain till altered, agreeable to the direction herein before given.

freſh evidence is to be taken of the current price, and a new aſſize to be made conformable thereto.

AND by ſection eighth it is further enacted, that in caſe any perſon or perſons ſhall be convicted of any of the offences mentioned in the ſaid act, or in this preſent act, before any magiſtrate or magiſtrates, juſtice or juſtices of the

peace, in that part of Great Britain called Scotland, ſuch conviction ſhall proceed, and be drawn up in the form commonly uſed and practiſed before ſuch magiſtrates or juſtices of the peace, in convictions for other offences of the like nature; any thing in the ſaid act to the contrary notwithſtanding. § 5. ASSIZE IN SCOTLAND. Method of proceeding in caſe of conviction of offenders in the recited or preſent act.

AND whereas it may happen, that the magiſtrates of ſome of the cities or boroughs in that part of Great Britain called Scotland, may neglect to exerciſe the powers committed to them, of ſetting and appointing the aſſize of bread within their reſpective cities and boroughs; be it therefore enacted by the authority aforeſaid, that in caſe of ſuch neglect of the magiſtrates of any ſuch city or borough to ſet an aſſize of bread, or to alter any former aſſize ſet by them by a new aſſize, when ſuch alteration in the price of wheat or other grain ſhall occur as is ſufficient to authorize an alteration of the laſt aſſize of bread according to the ſaid act, it ſhall and may be lawful for any two or more of the juſtices of the peace of the county within which ſuch city or borough lies, to require the chief magiſtrate of ſuch city or borough, by a writing under their hands, to ſet the aſſize of bread, or to alter any former aſſize of bread, according as the caſe ſhall occur; and in caſe ſuch chief magiſtrate, or the other magiſtrates of the ſaid city or borough, ſhall refuſe or neglect, for the ſpace of ten days after ſuch requiſition, to ſet ſuch aſſize, or to alter any aſſize then in force, when the alteration of the price of wheat or other grain does permit the ſame, then, and in every ſuch caſe, any two or more juſtices of the peace of ſuch county ſhall have power, and are hereby authorized, after taking proof of the prices of the ſeveral kinds of grain, meal, or flour, in manner above directed, to ſet, aſcertain, and appoint, an aſſize of bread for ſuch city or borough, which ſhall remain in full force until altered by the magiſtrates thereof, or in caſe of

Where the magiſtrates of any city or borough neglect their duty in ſetting the due aſſize of bread.

Two juſtices of the county, &c. may require them to ſet or alter the ſame;

and on their neglect to comply therewith within ten days, they may ſettle ſuch aſſize themſelves.

§ 5. ASSIZE IN SCOTLAND. their neglect, by any two or more of the ſaid juſtices of peace [a].

The recited act, where not altered by this act, to extend to and be in force within Scotland. IT is further enacted, that every clauſe, matter, and thing contained in the aforeſaid act of the thirty-firſt year of his late majeſty's reign, ſhall remain and continue in full force, in that part of the kingdom of Great Britain called Scotland, except in ſo far as the ſame is altered by this act [b].

If the magiſtrates do not fix an aſſize. THE magiſtrates and juſtices of peace are to take a proof of the price in the manner directed by the ſtatute. It is ſpecially directed that the aſſize is not to be limited to any particular period, but to continue till a new aſſize be ſet. If the magiſtrates neglect to fix an aſſize, any two juſtices of the peace may require them to fix one; and, in caſe of their refuſal, the two juſtices may proceed to fix it themſelves. But the remedy is carried no farther. If the juſtices do not interfere, no private individual, on the one hand, or baker, on the other, is authorized to interfere. The application by any two of the inhabitants or bakers, mentioned in clauſe § 7, relates to the raiſing or lowering it, and not to the eſtabliſhing it, where it is thought adviſable to diſpenſe with it altogether. And in the ſtatutes above mentioned, the caſe is figured of their being no aſſize, and regulations are adapted to that ſituation of things; for wherever there is no proper market for corn, it is extremely difficult to learn the prices correctly. Accordingly, in ſome places of the country, it has, on this account, been judged adviſable, by way of experiment, to diſcontinue the aſſize, and to confine the interference of the magiſtrate to the preventing of any deficiency in the weight, or any thing unwholeſome in the quality of the bread. The weight of the bread is ſtill regulat-

[a] § 9.

[b] § 10.

[c] Or, contrary to the regulation of § 21 of the leading ſtatute, 31 Geo. II, c. 29.

§ 5. ASSIZE IN SCOTLAND.

ed as before, and its quality examined: but its price, and the ſpecies of it, as wheaten, houſehold, ſtandard, or other, is left entirely at the diſcretion of each particular dealer [a]. And, from a compariſon of the average prices of bread there, with the prices where there is an aſſize, it has not appeared that the intereſts of the public may not, in this inſtance, as in moſt others, be ſafely intruſted to the natural competition of the trade. It is almoſt unneceſſary to add, that, in ſuch a ſtate of things, any meetings or agreements, or underſtanding among the bakers, as to regulating the prices, would be not only blameable, but ſeverely puniſhable, under the laws againſt combinations.

UNDER the above ſtatutes one general queſtion occurs: is it competent to bring the legality of the manner of fixing an aſſize under review? In ſuch a caſe the court of ſeſſion ſuſtained its juriſdiction [b].

[a] About the time of the late ſcarcity, the magiſtrates of Edinburgh, with the advice and concurrence of the judges of the court of ſeſſion, agreed to try this experiment. As Edinburgh "is the capital city of the "nation, where the chief judicatories "reſide," the act 1686, c. 12, gave juriſdiction to the "lords of ſeſſion, "with advice and conſent of the ma"giſtrates," in certain matters touching police. On this footing, and alſo as ſucceſſors of the daily council, a parliamentary committee, the lords of ſeſſion have been in the practice of concurring with the magiſtrates, not only regularly in the fixing an aſſize, but occaſionally in other branches of police. See acts of ſederunt, 15th January 1669, 29th January 1687, 16th January 1736, 25th February 1743, 26th July 1748.

[b] 27th January 1803, Ro. Pearſon. The magiſtrates of Cupar, on a proof of the fall in the price of grain, lowered the aſſize. The bakers complained that the price of the laſt year's crop, and of foreign grain, which were neceſſary in the baking of bread, had not entered into the calculation. A bill of ſuſpenſion was refuſed by the lord ordinary, on the ground, that, by 3 Geo. III, c. 6, an aſſize once fixed remained till a new aſſize. But the court ſeemed rather to think that thoſe clauſes had in view an aſſize regularly fixed, but could not exclude the cognizance of courts of law as to the previous queſtion, whether that had been done or not. The bill was paſſed.

CHAP. VI.

Of Weights and Measures.

§ I. OF WEIGHTS AND MEASURES IN GENERAL.

I. "IT is ſene ſpeidful" (ſays an antient ſtatute [a]), "that "ſen we have bot *a* king and *a* law univerſall "throughout the realme, we ſould have bot *a* met and "meaſure to ſerve all the realme."

WEIGHTS and meaſures ought indeed to be univerſally the ſame throughout the kingdom, being the criterions which reduce all things to the ſame or an equivalent value. But as weight and meaſure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced into ſome fixed rule or ſtandard; which ſtandard it is impoſſible to fix by any written law or oral proclamation; for no man can by words only give another an idea of a foot-rule or a pound weight. It is therefore neceſſary to have recourſe to ſome viſible, palpable, material ſtandard, by forming a compariſon with which all weights and meaſures may

[a] James II, 1457, c. 82.

be reduced to one uniform ſize, and from which it is held a puniſhable miſdemeanour to deviate. § 1. OF WEIGHTS &c.

II. THIS offence, accordingly, is acknowledged as a point of dittay in the Leg. Burg c. 74, which place the offender's life and limb in the king's will for the fourth offence. Such offenders are alſo declared to be puniſhable "as falſars[a]," and with eſcheat of moveables[b]. And the general ſtatute commits the care of this matter to the juſtices of the peace, magiſtrates of boroughs, and more eſpecially to the dean of guild[c]. § 2. PUNISHMENT OF USING FALSE WEIGHTS AND MEASURES.

To conſtitute this offence, it is neceſſary, *1ſt*, "that the "deficiency of weight or meaſure be manifeſt and mate- "rial; ſuch as is injurious to the one party, and cannot be "imputed to mere miſtake on the part of the other[d]." *2dly*, "The falſe weights muſt have been uſed and given out for "the true ones (but this may be done tacitly, and will be "preſumed againſt the uſer), and the traffic have been car- "ried on accordingly." *3dly*, "They muſt be charged to "be different from the legal ſtandard; for if the charge is "only of a deviation from the cuſtomary weight or meaſure "of that neighbourhood or diſtrict (a thing for which there "is no rule nor authority); this of itſelf, and without far- "ther accuſation of ſome ſpecial device and dole, by which "deception has been occaſioned, does not ſeem to be a rele- "vant charge[e]." What conſtitutes the offence. Different from the legal ſtandard.

III. THE puniſhment of falſe weights and meaſures ſuppoſes the exiſtence of a legal ſtandard. The attainment of ſuch a ſtandard has been the ſubject of more copious than ſucceſsful legiſlation in both parts of the united kingdom. § 3. ANCIENT SCOTTISH STANDARDS.

[a] James IV, parl. 4, 1493, c. 47.
[b] James VI, parl. 19, 1607, c. 2.
[c] Appendix I, p. 57.
[d] Hume, vol. i, p. 256.
[e] Sir James Dunbar and John Forſyth, Aug. 11, 1714. Hume, ibid.

§ 3. ANCIENT SCOTTISH STANDARDS.

In Scotland, the regulation of weights and measures never was referred to the king's prerogative, but was a matter of parliamentary jurisdiction.

It was early enacted, that "all burgesses may have in "their houfis measures to measure thair cornis, and ell, "stane, and wecht, to met, measure, and wey, thair guidis "and geir; and all measures and weichts fould be fellit "and markit with the common mark or ſtill of the burgh; "and quha bois funden havand fals wechtis or measuris, "he ſall pay to the burgh an unlaw of viij S [a].

It was alſo ordained, "that the chalmerlan clerk ſall "carrie with him wechtes and measures in ilk chalmerlan "air, and cauſe the trone wechtes to be maiſt ſharplie ſyll "menat, and that they agrie with his wechtes, in na maner "nor na leſſe [b]." It was "ſtatute be king David, that all "common and equall weicht, quhilk is called the weicht of "Cathneſs, in buying and ſelling, ſall be keiped and uſit "be all men within this realm of Scotland. 2, The law of "God commands, thou ſall not have in thy bagge twa maner "ner of weichts, ane mair, and ane other les; neither ſall "thou have in thine houſe divers measures, ane great, and "ane ſmall; but thou ſall have ane richt and juſt weicht." But the moſt accurate aſſize of our ancient weights and measures is contained in the following ſtatute of king Robert III.

Aſſize of weights and meaſures by Robert III.

"1, King David's common elne conteines threttie-ſeven "meaſured inches, with the inches of thrie men; ane maiſt "ill, ane middill, ane lytill; and ſall ſtand conforme to the "middill inch, or conforme to thrie grains of bear within "the tailis. 2, The ſtane to wey woll and other things "ſould have fivetene punds; ane ſtane of walx aught

[a] Balf. Pr. 88.

[b] Iter Camerarii, c. 30.

[c] Stat. David II, c. 111.

lve London punds makes ane ſtane. 3, Ane pound d wey twentie-five ſchillings: and this was in the time he aſſizes foreſaid; and the pound conteines fivetene s. 4, In the time of umquhill king Robert Bruiſe, great conqueſtour, firſt of that name, the pound of contained twenty-ſex ſchillings and four pennies; in ſt of the minoration of the pennie, or money of that ſra the money of king David foreſaid. 5, The unce ined, in the time of king David foreſaid, twentie ies; in the time of the ſaid king Robert I, it conteinventie-ane pennies; but now, in our days, that is, of Robert III, in the zear of grace 1393, the unce of ny contrines threattie-twa pennies. 6, The ſtirlin, in time of the ſaid king David, did wey threttie-twa es of gude and round quheat; but now it is otherse, be reaſon of the minoration of the money. 7, Ane ſhould contains twelve ſtane; the wecht quhereof rines aucht pound. 8, The boll ſould conteine ane nius, that is, twelve gallons; and ſall be in the deipaine inches, with the thickneſs of the trie, in beath ſides; and in the roundneſs above, it ſall conteine foure and twelve inches in the middis of the ower; and in the inferior roundneſs, it ſould conteine thrie eleven inches. 9, The gallon ſould conteine twelve d of water; that is, of ſea-water foure pound; of ind water foure pound; and of ſtandand water in foure pound. *Item*, the gallon ſould conteine in nes ſix inches, and ane halfe inch; and in the infebraidneſs aucht inches and an halfe inche, with the neſs of the trie of beath the ſides; and in the roundabove, it ſould conteine twentie-ſeven inches and ane ; in the inferior roundneſs, twenty-thrie inches. 10, inche, in all meaſures, ſould be meaſured at the ruit the naill; and ſould be in length conform to thrie

§ 2. ANCIENT SCOTTISH STANDARDS.

§ 3. ANCIENT SCOTTISH STANDARDS.

"grains of good bear [a]. Certain measures were appointed to be made, of boll, firlot, half firlot, peck, and gallon; and that none other be used, under the pain that may follow [b].

Of our later statutes regarding weights and measures.

AND by parl. 3, James I [c], a stone, weighing 15 lib. troy, is ordained to be made for all goods sold by weight; this stone is to be divided into 16 Scots pounds; and a half stone, a quarter, a half quarter, a pound, a half pound, and other lesser weights, are to be formed according to that standard. And by cap. 69 of the 4th parliament of the same prince [d], each troy pound is to contain 16 ounces. By cap. 68 of the same parliament, the ell is to contain 37 inches; and the 70th chapter regulates the division and quantity of the boll, firlot, and water weights.

FARTHER regulations respecting the same subject, were made during the succeeding reigns [e], which need not be particularly noticed.

Commissioners appointed for fixing a standard of weights and measures.

By the general statute which passed in the 22d parliament of James VI, c. 80 [f], the regulation of weights and measures was made a part of the jurisdiction of the justices of peace; and, for the purpose of fixing a standard of weights and measures, commissioners were appointed, who gave in, upon the 19th of February 1618, a very full report, containing the regulations for ascertaining a standard for weights and measures. This act and report was ratified and confirmed by parl. 23, James VI, c. 16 [g]. The standards fixed by these commissioners are shortly as follows.

Regulations reported by them, and their ratification.

[a] For a fuller account of our ancient weights and measures, see Balfour, p. 88—95, and 520, 521; and the late lord Swinton on weights and measures. 2d edit.

[b] Black acts, 1425, 63.

[c] 1425, c. 57.

[d] Anno 1426.

[e] James II, parl. 14, 1457, c. 73; and James IV, parl. 3, 1491, c. 9; and parl. 6, 1503, c. 96; James V, parl. 7, 1540, c. 114; and James VI parl. 11, 1587, c. 114.

[f] Anno 1617. Appendix I.

[g] Anno 1621.

THE Stirling pint, or jug, was made the unit of liquid measure, and was aſcertained by the weight of water contained in it. The keeping of this ſtandard jug was committed to the borough of Stirling. The firlot of Linlithgow was made the unit for dry meaſure; but, as formerly, wheat, rye, beans, peaſe, meal, and white ſalt, had been meaſured by the firlot ſimply, while malt, barley, and oats had been in uſe to be meaſured by heaping it; ſo a ſeparate firlot was, upon this account, made for malt, barley, and oats, and containing the ſame quantity as the other firlot did when heaped. § 3. ANCIENT SCOTTISH STANDARDS.

THE forms and dimenſions of both firlots[a] were aſcertained by the number of Stirling jugs or pints which they contained; and the keeping of them was committed to the borough of Linlithgow. The ell of Edinburgh was made the unit of lineal meaſure, and committed to the charge of the city of Edinburgh. The French troy ſtone weight was made the unit of weights, and committed to the keeping of the borough of Lanark. And the weight, called the trone weight, was declared to be aboliſhed for ever. Double ſtandards of all theſe weights and meaſures were ordained to be made, and two of each of them to remain in the regiſter in the caſtle of Edinburgh, and other two to remain in the caſtle of Dumbarton, to ſerve as a warrant for the meaſures and weights. The other doubles were ordered to be depoſited with the four boroughs mentioned in the act, and employed for the purpoſe of aſſizing thoſe weights and meaſures, which were to be delivered, under the mark of theſe boroughs, for the uſe of the public: which weights and meaſures were ordained to be received and uſed; and all firlots uſed in markets to be burned, and ſealed, either with the marks and ſeals of the borough of Linlithgow, or with the

[a] Theſe dimenſions, owing to an error in calculating or gauging, were erroneous: to make their contents agree with the quantities preſcribed by the ſame act, the wheat firlot ſhould have been ſeven inches and ſix-tenths in depneſs, inſtead of ſeven inches and one-third, and the barley eleven inches and ſomething more than one-tenth, inſtead of ten and one half.

§ 3. ANCIENT SCOTTISH STANDARDS.

burning-iron of the head borough of that ſhire in which ſuch markets are held.

THE act, Cha. II, 1663, c. 17 [a], ordains that the meaſure of coal ſhall be by the Culroſs chalder; and, c. 28, that the foot meaſure ſhall contain twelve of thoſe inches of which the ell contains thirty-ſeven; that this ſtandard foot be made and preſerved by the magiſtrates of Edinburgh; and that all boroughs have a meaſure made according to it, under the penalty of 100l. Scots. By act [b] 1681, c. 24, bread and butcher-meat are ordained to be ſold by weight. The penalty of tranſgreſſion is fixed at 100l. Scots, *toties quoties*. By act [c] 1685, c. 44, the mile is ordained to conſiſt of 1760 yards, as in England. The laſt Scottiſh ſtatute on the ſubject of weights and meaſures, which deſerves to be noticed, is the act [d] 1696, c. 6, which enacts, "that all ſorts of meal "bought and ſold within this kingdom, ſhall be ſold and de"livered by weight, at eight ſtone troy weight, in place of "the boll of Linlithgow meaſure, and ſo proportionally, un"der the pain of confiſcation of all meal ſold otherwiſe than "is hereby appointed, and impriſonment of the ſeller there"of for a week, *toties quoties*."

The ſame meaſures and weights to be uſed both in Scotland and England.

SUCH are the principal Scottiſh ſtatutes made upon the ſubject before the Union. But by the 17th article of the treaty of Union, "it is declared, that the ſame weights and "meaſures ſhall be uſed throughout the united kingdom as "are now eſtabliſhed in England; and ſtandards of weights "and meaſures ſhall be kept by thoſe boroughs in Scotland "to whom the keeping the ſtandards of weights and mea"ſures does of ſpecial right belong; all which ſtandards "ſhall be ſent down to ſuch boroughs from the ſtandards "kept in the exchequer at Weſtminſter, ſubject to ſuch re"gulations as the parliament of Great Britain ſhall think fit."

[a] Charles II, parl. 1.
[b] Charles II, parl. 3.
[c] James VII, parl. 1.
[d] William and Mary, parl. 1, ſeſſ. 6.

ound; and whereby are weighed ſilk, gold, ſilver, and precious ſtones [a]: and *avoirdupois*, which is by a, yet confirmed by ſtatute; and whereby are weighed ds of grocery wares, drugs, butter, cheeſe, fleſh, wax, tar, tallow, wool, hemp, flax, iron, ſteel, lead, and all commodities, which bear the name of Garbel, and of iſſueth a refuſe or waſte (and alſo bread, by the 31 II, c. 29); and this hath to the pound ſixteen ounces, velve pounds over are allowed to every hundred [b]. By m. VII, c. 5, every buſhel ſhall contain eight gallons eat, and every gallon eight pounds troy, and every twelve ounces, on the penalty of 20l. upon every orough, town, or place, having the keeping of com- neaſures, that ſhall keep any other buſhel or gallon. y 13 and 14 Will. III, c. 5, a legal Wincheſter buſhel, ling to the ſtandard in the exchequer, ſhall be round, plain bottom, eighteen one half inches wide through- nd eight inches deep [c].

weights.

Troy, what?

In what uſed.

Avoirdupois.

In what things uſed.

Buſhel, what?

ſtandard of theſe weights was originally taken from of wheat; whence the loweſt denomination of weights ed a grain, thirty-two of which are directed by ſtatute apoſe a pennyweight, whereof twenty make an ounce, upwards, as already mentioned [d].

§ 4. ENGLISH STANDARDS.

THE Engliſh hiſtorians inform us, that king Henry I. commanded that the ulna, or ancient ell, which anſwers to the modern yard, ſhould be made of the exact length of his own arm. And one ſtandard of meaſures of length being gained, all others are eaſily derived from thence; thoſe of greater length by multiplying; thoſe of leſs, by ſubdividing that original ſtandard. Thus five yards and a half are required to make a perch, or pole, and one yard is ſubdivided into three feet, and each foot into twelve inches, which inches will be each of the length of three grains of barley. By the bill already mentioned, a ſtraight braſs rod, made by direction of the committee, was to be the only ſtandard yard and unit and only ſtandard meaſure of extenſion. Superficial meaſures are derived by ſquaring thoſe of length, and meaſures of capacity by cubing them.

Meaſures of length. Ell.

Meaſures of capacity. Wincheſter buſhel.

THE Wincheſter buſhel is the legal Engliſh meaſure for all ſorts of grain. A legal Wincheſter buſhel, according to the ſtandard in the exchequer, muſt be round, with a plain bottom, eighteen one half inches wide throughout, and eight inches deep [a]. And every buſhel muſt contain eight gallons of wheat, and every gallon eight pounds troy, and every pound twelve ounces, on the penalty of 20l. upon every city, borough, town, or place, having the keeping of common meaſures, that ſhall keep any other buſhel or gallon [b]. And if any perſon ſhall ſell any ſort of corn or grain, ground or unground, or any kind of ſalt uſually ſold by the buſhel, by any other buſhel or meaſure than agreeable to the Wincheſter meaſure, containing eight gallons to the buſhel, ſtruck even by the brim by the ſeller, he ſhall forfeit 40s. on conviction before one juſtice, mayor, or other head officer, by oath of one witneſs, to be levied by the church-wardens;

it was propoſed that a piece of fine copper, made by direction of the committee, and deſcribed in the bill, ſhould be the original and genuine ſtandard of the troy pound, and ſhould be the unit and only ſtandard meaſure of weight.

[a] 13 and 14 William III, c. 5.

[b] 12 Henry VII, c. 5.

, or other head officer, ſhall ſuffer any other meaſure
ſed, than according to the ſtandard, and ſealed, he
rfeit 5l. half to the proſecutor, and half to the poor,
viction, by preſentment or indictment at the county
; by diſtreſs in default of diſtreſs, to be impriſoned
ment of the juſtices till paid [c]. And whoſoever ſhall
any other weight, meaſure, or yard, not according to
ndard, or keep any ſuch, whereby any thing is bought
d, ſhall forfeit 5s. on conviction before one juſtice,
, or other head officer, on oath of one witneſs, to be
by the overſeers and churchwardens, or ſome or one
m, to the uſe of the poor, by diſtreſs; in default of
s, impriſonment till paid [d]; but water meaſure, viz.
cks to the buſhel, in ſea-port towns, to continue as
; except in the meaſuring of corn or grain, ground
round, and ſalt [e].

One juſtice has power to proceed on oath of one witneſs.

It does not ſeem neceſſary here to go into any longer
of thoſe numerous enactments, by which that uni-
y of weights and meaſures, ſo much wiſhed for, has
en effected. This fact was aſſumed in the above-men-
bill, grounded upon the report of the parliamentary
ittees; and as that bill, though printed, has not been
r followed out, the ſame ſtill remains to be the ſubject
ure legiſlation. In the meantime, it may ſuffice, for

§ 4. ENGLISH STANDARDS. Scottiſh ſtandard weights and meaſures, and for converting them into each other.

§ 5. BRITISH STANDARDS. V. UNDER the above clauſe of the articles of Union, there cannot be any doubt of the Engliſh ſtandards having been intended to ſuperſede the Scottiſh, that uniformity might obtain over the united kingdom. Excepting, however, that in ſome counties the Wincheſter buſhel is beginning to be uſed, the practice has continued as formerly; chiefly, lord Swinton thinks, from due pains not having been taken to enable the people to convert the one into the other. Beſides, the legiſlature has countenanced this practice, by adopting, on more than one occaſion, our ancient Scottiſh ſtandards [a]. In like manner, the ſupreme court has occaſionally interfered for their more correct regulation [b]. And in modifying miniſters ſtipends, the Teind court, to this day, uniformly employs the Linlithgow meaſure.

Union.

IN in this country, as well as in England, there are alſo ſeparate local weights and meaſures ſtill uſed in the differ-

[a] Thus, by the 24 Geo. II, c. 31, § 4, it is enacted, that all lintſeed and hempſeed ſhall be ſold by the Linlithgow barley meaſure, ſtreaked, under the penalty of 40s.; and this, notwithſtanding the duties on import are all paid according to Engliſh weights and meaſures.

[b] Thus in Finlay, &c. v. Magiſtrates of Linlithgow, the court of ſeſſion (July 5, 1782) found the method preſently uſed in adjuſting the firlot meaſure was erroneous, and "remitted to the lord ordinary to direct a ſtandard to be made conform, &c. to be held in all time coming as the ſtandard firlot meaſure." His lordſhip (13th July 1782) accordingly directed, &c. The report in the Fac. Col. and Diſt. goes no farther; but his lordſhip (4th Feb. 1783), "in reſpect the purſuers have never yet got the ſtandard firlot meaſure made, &c. recalled the interdict, and allowed the magiſtrates of Linlithgow to cauſe make firlots from the old ſtandard meaſures." Thereafter, the ſtandards, as directed, having been made, the purſuers inſiſted in the cauſe. But the court, in general, entertained doubt, whether the interlocutor, 5th July 1782, was not *ultra vires*; and therefore (19th May 1791), inſtead of following out the previous order, as to the adoption of the new ſtandard meaſure, only corrected the practice of the magiſtrates of Linlithgow in the way of filling the jug, as diſconforms to the ſtatute.

ent counties; which, however, are ſo far from being countenanced by law, that in the caſe of a criminal trial, as we have ſeen, it is not a relevant charge that there has been a deviation from the cuſtomary meaſure or weight of the diſtrict or neighbourhood [a]. Nay, in ſtrictneſs, it is even indictable to make uſe of any weight or meaſure different from thoſe which national authority has eſtabliſhed; and if this appointment cannot everywhere "be executed, "by reaſon of the long practice and known cuſtom of cer- "tain counties or diſtricts to the contrary, it is not there- "fore to be imagined that the law is therefore obſolete, nor "that in other quarters of the kingdom, or with reſpect to "other commodities which have not been ſubject to any "ſuch irregularity, a licence has been gained, of dealing, "by various or arbitrary weights or meaſures, ſuch as are "of no known proportion, and are not reducible to any "ſtandard [b]."

§ 5. BRITISH STANDARDS.

Local weights, &c.

Upon this grievance, which is felt in England as much as in this country, there are one or two late deciſions of the court of king's bench, which merit attention. One was, that although there had been a cuſtom in a town to ſell butter by eighteen ounces to the pound, yet the jury of the court-leet were not juſtified in ſeizing the butter of a perſon who ſold pounds leſs than that, but more than ſixteen ounces each, the ſtatutable weight [c]. In the other, it was deter-

[a] Aug. 11, 1714, Sir James Dunbar and John Forſyth. Hume, vol. i, p. 257; 1503, c. 96.

[b] Hume, ibid.

[c] Chriſtian's Blackſtone, b. i, p. 276, n. 27.

Lord-chief-juſtice Kenyon, ſaid: "In deciding this queſtion, I wiſh "not to be underſtood to ſay that a "cuſtom may not prevail that but- "ter ſhall be ſold in lumps, or yards, "containing any given number of "ounces; but the queſtion now be- "fore the court, is, whether a cuſ- "tom in Southampton, that a pound "ſhall contain 18 ounces, can be "ſupported in law. To ſay that it "can, would be to violate all the "rules of language, as long as the "acts of parliament, which have "been cited, are to regulate this ſub- "ject."

Mr. juſtice Aſhhurſt, ſaid: that "the "only ground on which this cuſtom

§ 5. BRITISH STANDARDS.

mined that no practice or uſage could countervail the ſtatutes 22 Car. II, c. 8 and 22, and 23 Car. II, c. 12; which enact, that if any perſon either ſell or buy grain or ſalt, by any other meaſure than the Wincheſter buſhel, he ſhall forfeit forty ſhillings, and alſo the value of the grain or ſalt ſo ſold or bought; one half to the poor, the other to the informer [a].

" can be ſupported, is a ſuppoſition " that the legiſlature did not intend " to interfere with the cuſtoms of " any particular place; but that is " totally unfounded: for the legiſlature ſuppoſed that at the times " when the ſeveral acts paſſed, diffe[rent] weights and meaſures prevailed in different towns, to remedy which inconvenience they paſſed thoſe acts."

Mr. Juſtice Buller: "I have never " ſeen any thing in the acts of parliament requiring perſons not to " ſell more or leſs than a pound. " But the queſtion here, is, whether, " when a perſon is ſelling butter, un" der the ſpecific denomination of a " pound, he ſhall be compellable to " ſell more than a pound? I am of " opinion that the cuſtom cannot be " ſupported." May 15, 1789, Noble againſt Durell. Termly reports, vol. iii, p. 271.

[a] Chriſtian's Blackſtone, ibid.

This was a conviction on the 22 Car. II, c. 8, § 2 and 22 and 23; Car. II, c. 12, § 2, for buying corn on the 23d July 1791, at Newport, in the iſle of Wight, which contains a pint more than the Wincheſter meaſure. The defendant was convicted in 40s. and 10l. 15s. being the value of the wheat ſold.

" The court ſaid, that as this was " a queſtion of very general concern, " they would take time to conſider " of it."

" Lord Kenyon, chief-juſtice, now " delivered the opinion of the court. " We have hitherto delayed giving " judgment in this caſe, in the hope " of diſcovering that the farmers in " general have been acting under a " miſtake; for it is a matter of no[to]" toriety, that in different parts of " the country corn is ſold by different " meaſures, ſome greater and " others leſs, than the Wincheſter " meaſure. This queſtion depends on " the ſtatute, 22 Car. II, c. 8, and the " 22 and 23 Car. II, c. 12. The former " impoſes a penalty of 40s. on any " perſon who ſhall ſell corn or grain " uſually ſold by buſhel, by any other " buſhel or meaſure than the Wincheſter meaſure. The ſtatute 23 " and 23 Car. II, c. 12, recites the " former act; and, in order to en" force it, ſubjects both the buyer " and ſeller to an accumulative pe" nalty, the value of the corn ſold. " Theſe acts of parliament are ex" preſſed in the moſt poſitive terms " and it was admitted in the argu" ment that there was no ſubſequent " law which directly repealed them. " But ſeveral other ſtatutes for the " regulation of the corn trade were " referred to, directing returns of the

ing, from the grand juries in different counties, that
lecifion gave great ſatisfaction. In order to decide
aſe, we have only to look at the very words of the
e 22 and 23 Car. II, which expreſsly ſubject the
to both the penalties; for it is thereby enacted, that
ıyer ſhall forfeit and loſe, beſide the penalty of the
r act, all corn bought, &c.; that is, he is to forfeit
ılue of the corn in addition to the penalty of forty
ıgs impoſed by the former act." And juſtice Buller
, "The ſtatute 22 and 23 Car. II, c. 12, inſtead of
expreſsly that the buyer ſhall be liable to the penal-
forty ſhillings, and to the forfeiture of the corn ſo
ıt, has ſaid the ſame thing impliedly; for it ſays,
ıe ſhall forfeit and loſe, beſide the penalty of the for-
ıct (which is a penalty of forty ſhillings), the corn ſo
ıt," &c[a].

price of corn to be made, ıing in thoſe returns a cuſ- measure. Theſe, it was ar- ıliquely, though not direct- ıaled the ſtatutes of Cha. II. ve conſidered this matter ſly, and are of opinion that ıument does not lead to that ıon. We cannot get rid of

" thoſe poſitive laws by a reference " to ſubſequent ſtatutes, which were " paſſed for another purpoſe, and " which leaves the former ones ſtill " in force. Conviction affirmed." The king againſt J. Major, 15th June 1792. Termly reports, vol. iv, p. 752.

[a] Termly reports, vol. v, p. 356.

CHAP. VII.

Of Masters and Servants.

§ 1. WHO COMPELLED TO SERVE?

I. SERVICE, a ſpecies of *locatio operarum*, ariſes, neral, from conſent. Yet the police magiſtracy have already ſeen, compel various deſcriptions of perſo to work, viz. indigent children, who, if declared ſuch magiſtrates of the borough, or kirk-ſeſſion, where ſeized, may be compelled to ſerve any of the king's ſ without wages, till the age of 30 [a]; vagrants and beggars, who may be compelled into ſervice by any factorer within the kingdom, at the ſight of the ma of the place where they are laid hold on [b]; and "if "ers, workmen, ſervants, ſhall refuſe to work at t "fixed by the juſtices of peace, the juſtices may "them to it by impriſonment, or further puniſhm "their diſcretion [c]."

Indigent children.

Vagrants.

Labourers, &c. refuſing to work at the rates.

§ 2. VOLUNTARY SERVICE.

II. THE relation of maſter and ſervant may be ed into either verbally or in writing. The wages

[a] 1617, c. 10; Appendix I, No. Erſk. b. i, tit. 7, § 61.

[b] Erſk. 1663, c. 16; Appendix I, No.

[c] Erſk. ibid. 1661, c. 58; Appendix I.

"By labourers or ſervan "clauſe of the act, may "ſtood" (ſays Mr. Erſki "able-bodied men or wo "have neither a ſufficient "their maintenance, nor a

§ 2. VOLUNTARY SERVICE.

ll as the time, are uſually fixed. If no time be ſtipu- it will be underſtood to be for the period, whether r half year, at which ſervants of the particular deſcrip- re uſually engaged[a]. An engagement for a long period s, even for life, does not conſtitute the ſtate of ſlavery; nnot therefore be pronounced illegal[b]; though a ſlave, his foot on Scottiſh ground, becomes free[c].

Verbal. If no time be ſpecified.

en a ſervant is hired from one term to another, warn- required forty days previous to the term; otherwiſe ſter, on the one hand, will be liable in wages, and (in : of domeſtic ſervants) in board-wages to the term; ervant, on the other, may be compelled to ſerve out e; or if that has become impoſſible, to pay dama-

Warning neceſſary.

[a] ſtatute 1621, c. 21, "one who has ſerved during winter half a year, cannot go at liberty the enſuing mer half year."

ngaging a ſervant, it is uſual to give earneſt, or

Earneſt, or arrels.

yment, though they ſhould ve at any time formerly a livelihood by ſervice." ike adds another claſs, viz. ed ſailors, who were *formerfunde*; but thoſe claſſes of now reſtored to the full en- of the privileges of other ubjects, by the ſtatute Geo.

f a perſon retain a ſervant ully, without expreſſing any the law ſhall conſtrue it to r one year; for that retainer ending to law." Coke, 2 Inſt. en.

k. b. i, tit. 7, § 62; Black. ed. Chriſt. b. 1, c. 14, p. 425. In the caſe of M'Vicar, to be mentioned below, lord Kames ordered an argument on the point; but it did not take place; for there the maſter, and not the ſervant, wiſhed to be free of the engagement. In the late caſe of M'Kenzie, to be mentioned below, an engagement for 18 years was not thought illegal.

[c] Jan. 1778, Dict. vol. iv, p. 282.

[d] July 14, 1779, Baird againſt lady Don. Dict. vol. iv, p. 18. A quarter's warning is required in England by 5 Eliz. c. iv, § 7. Burn, tit. Servant, § 1.

§ 2. VOLUNTARY SERVICE, —HIRING.

arrels[a]; which, however, are not neceſſary to the validity of the agreement: if really concluded, it is binding without any ſuch ſolemnity; and far leſs can it entitle either party to a file; the ſervant by offering it back, or the maſter by forfeiting it.

False characters.

As maſters may ſuffer ſo much by the diſhoneſty or unſkillfulneſs of their ſervants, the ſtatute 32 Geo. III, c. 56, empowers two juſtices of peace, on the oath of one witneſs, to award damages againſt perſons giving falſe characters[b]

[a] So called from the Roman *arrha*.

[b] By the 32 Geo. III, c. 56, after reciting, that falſe and counterfeit characters of ſervants, have either been given perſonally or in writing by evil-diſpoſed perſons, contrary to truth, and to the peace and ſecurity of his majeſty's ſubjects; after 1ſt July 1792, if any perſon ſhall falſely perſonate any maſter or miſtreſs, or the executor, adminiſtrator, wife, relation, houſekeeper, ſteward, agent, or ſervant, of any ſuch maſter or miſtreſs, and ſhall, either perſonally or in writing, give any falſe, forged, or counterfeited character of any perſon offering to hire; every ſuch perſon ſo offending ſhall forfeit 20l. § 1, 6.

And if any perſon ſhall knowingly and wilfully pretend, or falſely aſſert in writing, that any ſervant has been hired or retained for any time, or in any capacity whatſoever, other than that for which he was hired or retained; or for the ſervice of any other perſon; or that any ſervant was diſcharged or left his ſervice at any other time than that at which he was diſcharged or actually left ſuch ſervice; or that any ſuch ſervant had not been hired or employed in any previous ſervice contrary to truth; or if any perſon ſhall offer himſelf a ſervant, pretending that he has ſerved in any ſervice in which he hath not actually ſerved, or with falſe, forged, or counterfeit teſtimonials of his character; or ſhall in any add to, or alter, efface, or erase, any word, date, matter, or thing contained in, or referred to in any certificate given to him by any former maſter, or other perſon authorized by ſuch maſter; or having before been in ſervice, ſhall, when offering himſelf as a ſervant, falſely and wilfully pretend not to have been hired or retained in any previous ſervice; he ſhall, for every ſuch offence, forfeit 20l. § 2, 3, 4, 5, 6.

All which penalties aforeſaid may be recovered before two juſtices, on conviction, either on confeſſion, or the oath of one witneſs; half to the informer, and half to the poor: and if ſuch offender ſhall not immediately pay the ſame, together with 10s for the coſts attending ſuch conviction; or ſhall not give notice of appeal, and enter into recognizance

§ 2. VOLUNTARY —OBLIGATIONS.

If a ſervant be retained for any ſpecial work, or certain time, and depart before the concluſion of his agreement, action will lie againſt both him, and any one who ſeduces him, or, knowing his previous agreement, hires him [a]. From this ſort of property, which one is ſuppoſed to have in the labour of his domeſtics [b], a maſter may maintain an action againſt another for beating his ſervant [c], or juſtify aſſaulting another in defence of his ſervant, as the latter may in defence of his maſter [d], or aſſiſt his ſervant in ſupporting the expence of any action at law againſt a ſtranger; whereas,

Rights in conſequence of the hiring.

manner herein after mentioned, ſuch juſtices ſhall commit him to the houſe of correction, or other priſon, there to remain and be kept to hard labour, without bail, for any time not exceeding three, nor leſs than one month, until he pay the ſum ſo forfeited, together with ſuch coſts as aforeſaid. § 6.

And ſuch informer ſhall be a competent witneſs, notwithſtanding he is entitled to a part of the penalty. § 7.

Provided, that if any ſervant who ſhall have been guilty of any of the offences aforeſaid, ſhall, before any information has been lodged againſt him, inform againſt any perſon concerned with him in any offence againſt this act, ſo as ſuch offender be convicted thereof, ſuch ſervant ſhall thereupon be diſcharged from all penalties and puniſhments to which at the time of ſuch information given, he might be liable. § 8.

And the conviction may be drawn up in the following form, or to the ſame effect, viz.

Be it remembered, that on the day of A O is convicted before us J P and C P, two of his majeſty's juſtices of the peace for the county of . [Here ſpecify the offence, and the time and place when and where committed.] Given, &c.

And any perſon who may think himſelf aggrieved may appeal to the next ſeſſions, upon entering into a recognizance with two ſureties in 20l. each, to try ſuch appeal, and abide the order of, and pay ſuch coſts as ſhall be awarded at ſuch ſeſſions: and on proof of ſuch notice and recognizance, the juſtices ſhall hear and finally determine ſuch appeal in a ſummary way, and award ſuch coſts to either party as they ſhall think proper, which ſhall be binding and concluſive to all intents and purpoſes; and no ſuch conviction, order, or other proceeding as aforeſaid, ſhall be quaſhed for want of form, or removed by *certiorari* into any other court. § 10.

[a] Cowper, 54. Burn, tit. Servants, § 271.

[b] 1 Black. Com, 429.

[c] 1 Roll. Abſ. 115, Laws of maſter and ſervant, 14.

[d] Ibid. 1 Black. Com. 429.

§ 2. VOLUNTARY —OBLIGATIONS.

in general, it is an offence againſt public juſtice to encourage ſuits and animoſities by ſuch aſſiſtance [a].

HENCE, alſo, a maſter is bound to fulfil the bargains, and repair the damage, done by his ſervants in things committed to their charge: In other matters the maſter is not anſwerable for the conduct of his ſervant [b]. So if a ſervant creates any nuiſance [c], or does other injury on the highway [d]; if a ſmith's ſervant lame a horſe whilſt ſhoeing him [e]; or a carrier's ſervant loſe goods; or a pawnbroker's ſervant, the pawn entruſted to him [f]; in all ſuch caſes, the maſter, as well as the ſervant, is liable in damages [g].

Maſter liable for his ſervant.

[a] 1 Roll, Abſ. 115, Laws of maſter and ſervant, 14.

[b] Bankton, b. i, tit. 2, § 54.

[c] As throwing dirt on the highway, L. Raym. 264. Burn, tit. Serv. § 26.

[d] A ſervant with a cart ran againſt another cart whereon was a pipe of ſack, and ſpoiled the ſack. An action lies againſt the maſter. 2 Salk. 441. A gentleman's ſervant brought a coach and two ungovernable horſes of his maſter's into Lincolns-inn fields, in order to break them; and they, from the careleſſneſs of the driver, ran over a paſſenger. Action was found againſt both maſter and ſervant. 3 Kel. 65; 1 Vint. 295; Law of maſter and ſervant, p. 7.

[e] Black. Com. 431.

[f] Wood, b. i, c. 6; 2 Salk. 441.

[g] H. 8 G. Mead and Hammond. The plaintiff, according to the common courſe of dealing, delivered to the defendant's ſervant an ingot of gold to aſſay; and it not being returned, he brought an action againſt the maſter; and Pratt, ch. j. directed the jury, that the delivery to the ſervant was ſufficient to maintain the action againſt the maſter, on proving a ſubſequent demand and refuſal; and the plaintiff had a verdict. Str. 505.

M. 8 G. Carey and Webſter. The defendant was a clerk of the South ſea company, and took in payments. The plaintiff paid him 600l. and he paid it to the company; Pratt ch. j. ruled no action in this caſe lies againſt the ſervant. If he had not paid it over, the plaintiff would have had his option either to charge him or the company; as in the common caſe of payment to a goldſmith's ſervant, who doth not carry it to the account of his maſter, the party hath an election to go againſt either; he may charge the ſervant, becauſe the money is paid over, the ſervant receives it to his uſe; or he may pay by the ſervant, and make his demand upon the maſter, becauſe the payment to the ſervant is made in confidence of the credit given him by the maſter. Str. 480. See debated, at large, whether one, the careleſſ

§ 2. VOLUNTARY OBLIGATIONS.

WHETHER a maſter ſhall be liable or not for goods taken by his ſervant in his name, depends upon the manner of former dealing. If, therefore, I pay money to the ſervant of a banker, and he embezzle it, the banker will be anſwerable; but it is otherwiſe if I pay money to a phyſician's ſervant, whoſe proper buſineſs is not to receive money for his maſter [a].

Servant taking up goods.

FREQUENT permiſſion to do a thing is equivalent to a general command. If a perſon has been in the practice of dealing with his merchants and tradeſmen himſelf, always paying ready money, he will not be anſwerable for what his ſervant may take up in his name, unleſs it be *in rem verſum*; but if the ſervant (or other perſon) be uſually ſent on truſt, or come ſometimes with money and at other times on truſt, the maſter is liable to the tradeſman, who cannot know when the ſervant comes by his own authority, and when by his maſter's command; or when with, or when without the money; and has no controul over him whether he ſhall carry the goods home, or diſpoſe of them otherwiſe [b].

Edict nautæ caupones ſtabularii.

The *nautæ, caupones, ſtabularii* were, by the prætor's edict, anſwerable for whatever the traveller brought into the inn, ſhip, or ſtable, and of courſe for the diſhoneſty, as well as ignorance and careleſſneſs, of thoſe in their employ [c]; as with us the ſame claſs of perſons, viz. ſhipmaſters, inn-

whoſe ſervant occaſioned the ing of a houſe belonging to ſhould be liable in the dam- Feb. 13, 1685, ſir R. Sibbald lady Roſſyth. Fount. vol. i, 341. 1. 2 Black. Com. 430.

[b] This diſtinction was laid down by the late lord-juſtice-clerk Mac- and approved by the court in the caſe Inches againſt Elder, 22d Nov. 1793. The ſame diſtinction obtains in England. See Bac. Abridg. 61, and Law of maſter and ſervant, p. 6.

[c] Ff. lib. iv, tit. 9, l. 1. Ait prætor nautæ, caupones, ſtabularii, quod cujusque ſalvum fore receperint, niſi reſtituent, in eos judicium dabo.

§ 2. VOLUNTARY OBLIGATIONS.

keepers [a], vintners in boroughs [b], houſe
ings [c], carriers and proprietors of ſtag
jected in the like reſponſibility; whic
not ariſing *damno fatali* or *vi majori* [e].

If the maſter die before the term.

If the maſter die before the term.

If the maſter die before the term. to full wages, and (if he was mai
in the family) to aliment to the t
out exception in the caſe of eng
But if the maſter who has enga
year or longer period, die durin
half year, the ſervant having
for another place, and being in
ſo, will not be entitled to n
wages and aliment [g].

Servant ſick, Is he entitled to board wages if he leaves the houſe.

If the ſervant die before t
titled to his wages only for th
" man, or the ſervant, who
" is entitled to his full wa
" by ſickneſs, or other acc
" for a part of that time

[a] Erſkine, b. iii, tit. 1, § 28.

[b] Feb. 17, 1687, Maſter of
Fountainhall.

[c] July 5, 1694, May, ibid.

[d] Feb. 6, 1787, Macauſlan
Col.

[e] 13th Feb. 1801, Ja. H
Wordſworth, ſtabler a
breaker. A horſe was giv
to Wordſworth to break
dog attacking it as the
leading it out of th
took fright, run off,
hurt, in conſequence
came lame. Wordſw
jected in the value of
edict was found to a

him (as Paulus humanely expreſſes it) *quos curamus ægros, quippiam ſervire, propter adverſam valetudinem impediuntur* [a]. Perhaps, therefore, it may appear to follow, that if it is found proper and neceſſary to remove the ſervant, to be under the care of his friends, the maſter is liable in board wages; becauſe he may inſiſt on keeping the ſervant in the houſe, if he chooſes it. § 2. VOLUNTARY —OBLIGATIONS.

IF, without a juſt cauſe, the maſter ſhall diſmiſs his ſervant, he will be liable in full wages, and, if the ſervant lived in the family, in board wages: The ſervant, on the other hand, if he break his ſervice, will not only forfeit all claim to wages for the time he has ſerved, but may further be compelled by impriſonment to return [b]; or, if that has be- Maſter diſmiſſing his ſervant. Servant leaving his maſter without a juſt cauſe.

[a] L. 4, § 5. Ff. De ſtatu lib. Paulus here was ſpeaking of an engagement for a year, and uſes the expreſſion *paucos dies*. M. Pothier, therefore, is for limiting the rule to an interruption of that ſhort continuance, obſerving, that if it be for a more conſiderable portion of time, and if maſters in ſuch a caſe inſiſt not on a proportional deduction from the ſervant's wages, "*c'eſt une généroſité de leur part, qui à la vérité eſt de bienſéance à l'égard des perſonnes riches et d'une profeſſion noble.*" (De Droit Civil, &c. t. 2, p. 253.) Our practice inclines to the humaner ſide. Even for an illneſs that had laid aſide the ſervant for 11 weeks, the court of Seſſion allowed no deduction from the year's wages. (29th Nov. White, 1794. Fac. col.)

[b] This right of compelling the ſervant by impriſonment to finiſh his engagement, ariſes from a maxim, that it is only in *locum facti impreſtabilis*, that *ſuccedit damnum et intereſſe*. Inſtances daily occur of warrants of impriſonment being granted in the caſe of apprentices; and there is no principle of common law to diſtinguiſh their caſe from that of other ſervants. In England, it is ſaid common law gives the maſter no right to impriſon either apprentice or ſervant, *ad factum præſtandum*. Particular ſtatutes have therefore been paſſed for enabling maſters to compel apprentices to perform their engagement. (5 G. I, c. 4, 20. G. II, c. 19. 6 G. III, c. 25.) And in France, the ſame ſeems to have been the caſe with all ſervants, but ſailors, and menial ſervants, whom M. Pothier mentions as an exception to the general rule. *Par une exception, &c. les matelots qui ont loué leurs ſervices pour un navire, peuvent être contraints préciſément à les rendre*, (t. 2, p. 432.); and, in another place, ſays, Serviteurs qui louent leurs ſervices aux bourgeois des villes, ou

§ 2. VOLUNTARY —OBLIGATIONS.

come impoſſible, will be liable in damages, and fine, *in poenam*.

Juſt cauſes for diſmiſſing a ſervant.

IF a ſervant be not qualified for the place he undertook, or give the maſter or miſtreſs abuſive or diſreſpectful language [a], or refuſe to do his maſter's buſineſs; ("which is in "law a departure from his ſervice, though he ſtill continues "under his maſter's roof [b];") or be guilty of diſhoneſty; or

même à la campagne aux gentilshommes *pour le ſervice de la perſonne* du maître, &c. il ne leur eſt pas permis de quitter le ſervice du leur maître ſans ſon congé, et ils doivent être condamnés à retourner, ou juſqu' au jour du prochain terme auquel il eſt d'uſage dans le lieu de louer des ſerviteurs, ou ſeulement juſqu' à ce que le maître ait le temps de ſe pourvoir d'un autre ſerviteur lèquel temps lui eſt limité par le juge. (Ib. 255.)

[a] Both in the one caſe and the other, the maſter muſt be able to prove ſomething ſpecific againſt the ſervant. His own averment, in general, as to either ignorance or impertinence, will not be ſuſtained. A wet nurſe was diſcharged by her miſtreſs for being inſolent and ſubject to paſſion; which was inſiſted to be a reaſonable cauſe to diſcharge her. This caſe having come before the court of king's bench, lord-chief-juſtice Mansfield ſaid, "No perſon "can be judge in his own cauſe; "and this principle could never be "meant to be overturned by any "law or uſage whatſoever." The ſervant had a verdict for the whole year's wages. Temple *v.* Preſton. Burn *v.* ſervant.

[b] Dalt. 187. But the diſobedience muſt be with regard to ſomething which it was reaſonable in the maſter to command him to perform. July 1775, Fairie againſt M'Vicar. In April 1769, a written agreement was entered into betwixt John Fairie, coalmaſter in Rutherglen, and Neil M'Vicar, deſigned his ſervant. The latter became bound and obliged as a "ſervant and grieve and "overſeer to the ſaid John Fairie in "his other ſervants and works and "ſervices, whereuntil he the ſaid "Niel M'Vicar has formerly been em"ployed by the ſaid John Fairie, and "is in uſe to ſerve, and that for all "the days, years, and ſpace, of the "ſaid John Fairie his lifetime, and "the joint lives of the ſaid John "Fairie and him the ſaid Niel Mac"vicar; and obliges himſelf that he "ſhall faithfully, diligently, and "obediently ſerve, obtemper, and "obey, his ſaid maſter in his ſaid "ſervice; and that he ſhall not ab"ſent or divert himſelf therefrom "without liberty aſked and given "except in caſe of ſickneſs."

On the other part, Fairie became bound to pay him, in name of fee and reward for his ſaid ſervice, 18l. quarterly payments, 18l. 4d. being in diſcharging a debt of 82l. ſterling which the latter owed him. In March 1771, Fairie deſired M'Vicar

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cording to the Engliſh lawyers, of any other "moral turpitude, even though it be not ſuch for which the ſervant may be proſecuted at common law [a]," ſuch ſervant y be diſmiſſed, and, according to circumſtances, will ei- r be entitled to no wages, or only for the time he has ac- lly ſerved. It is laid down, therefore, by the Engliſh yers, not only that a maid ſervant who falls with child [b], even a man ſervant who debauches any of the maid ſer- ts may be diſmiſſed, without being entitled to more than es for the time he has ſerved [c].

Immorality.

and aſſiſt at the windleſs wheel, ick the coals at a pit, that being ily work he had for him. Mac- replied he would do neither. he 4th of April he called upon after, under proteſt, to employ in terms of his agreement. In er, Mr. Fairie again deſired him ſiſt at the windleſs wheel, or the ing the coals at the pit. This refuſed; and the parties gave other mutual charges upon the act. Both the charges were nded, and the ſuſpenſions con- d; and lord Kames "found, m the terms of the contract, d other circumſtances of the ſe, particularly the rate of ges, and a diſcharge of a great n owing to the maſter, that Vicar was hired by Fairie as overſeer, not as a common ſer- nt, and muſt be employed ac- dingly." And upon a repre- tion his lordſhip adhered. On ing a reclaiming petition, and ers, the court adhered to this heuter. March, 1775.

Burn, tit. Servants.

In the Engliſh caſe of Aſhover Brampton, the queſtion occurred, whether a maſter, of his own authority, was entitled to diſmiſs a maid ſervant who had fallen with child.

Lord Mansfield ſaid, "the queſ- "tion is, has the maſter done right "or wrong in diſcharging his ſer- "vant for this cauſe? I think he did "not do wrong in diſcharging his "ſervant for this cauſe: ſhall the "maſter be bound to keep her in "his houſe? To do ſo would be "*contra bonos mores*:" and in a family "where there are young perſons, "both ſcandalous and dangerous." Cal. caſ. ii; Burn, ibid.

[c] 18 G. 3. K. v. Welford. John Dyer was hired for a year, and continued in his ſervice till within three weeks of the end of the year, when his maſter, on account of a *ſuppoſed* criminal intercourſe with a ſervant girl then big with child, diſcharged him, and offered him his whole wages, except 4s. which he inſiſted to keep back for the three weeks; but the ſervant refuſed to allow it, and ſaid he was willing to ſtay out his year, if his maſter would let him. After he was diſcharged, he went to a juſtice; but

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ON the other hand, if the maſter does not allow the ſervant "competent ſuſtenance [b]," or uſes him "with immoderate ſeverity [c]," or employs him in a capacity different

the juſtice telling him he could not recover the whole, and having no money to ſubſiſt upon, he accepted the money his maſter had offered him, abating the 4s. for the three weeks: that no order, in writing, was made by any juſtice to diſcharge him. Bearcroft and Caldecott inſiſted that the caſe of the K. v. Brampton was in point, for that the offence was equally *contra bonos mores* in the caſe of a man as of a woman; that however reluctantly he conſented to the diſcharge, it was only to an act, the effect of which, if refuſed, the law has given to the maſter by compulſion, and againſt the ſervant's will; that the fact of criminality was fully proved below, and was meant to have been ſtated.

By lord Mansfield.—Had the fact of criminality been poſitively ſtated, to be ſure it would have fallen within the principle of K. v. Brampton. Cal. caſ. 57. Burns, ib.

But in the caſe of K. v. Weſtmeon, M. 22 G. 3. it was ſaid by lord Manſfield, that a ſervant being the father of a baſtard child, prior to the maſter's hiring him, and the crime not committed when in his own houſe, the maſter ſhall not diſcharge him under this pretence: it is not debauching of his ſervant, or turning his houſe as it were into a brothel. Cal. caſ. 129. Burn, ib.

[b] Bank. b. i, tit. 2, § 55.

[c] Ibid. "All maſters have a power "of moderate chaſtiſement over their "ſervants, whether voluntary or neceſſary; and the maſters of public "workhouſes are, by 1672, c. 18, "allowed to go all lengths in correcting, life and torture excepted." Erſk. b. i, tit. 7, § 62.

But with us now, as it ſeems to be in England, this power of chaſtiſement muſt rather be confined to the caſe of ſervants under age. "If a "maſter or miſtreſs beats any ſervant of full age, it may be a good "cauſe of diſcharge, on complaint "to the juſtices." Dalton, c. 58; Black. 428; Burn, tit. Servants, § 10.

"Where a maſter, in correcting "his ſervant, happens to occaſion "his death, it ſhall be deemed homicide by miſadventure; yet if in "his correction he be ſo barbarous "as to exceed all bounds of moderation, and thereby occaſion the ſervant's death, it is manſlaughter at "leaſt; and if he makes uſe of an "inſtrument improper for correction, and apparently endangering "the ſervant's life, it is murder." 1 Haw. 73, 74. "And if the ſervant "ſhall depart out of his maſter's "ſervice, and the maſter happen after to lay hold of him, yet the "maſter in this caſe may not beat or "forcibly compel his ſaid ſervant, "againſt his will, to return or tarry "with him, or do his ſervice; but "either he muſt complain to the juſtices, for his ſervant's departure, "or he may have an action of covenant againſt his ſervant." Dalt. c. 121.

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from what he was particularly engaged for [a], or charges him, though not maliciouſly, with ſome act of diſhoneſty, or other offence which he does not prove; in ſuch caſes the ſervant may quit his ſervice without being liable in damages, and will be entitled to wages during the time he has ſerved, or to full wages and board wages alſo, as the caſe may be.

Why the ſervant may leave the ſervice.

It is a common notion with us, that a female ſervant, by her marriage, becomes free from her engagement; and it muſt be owned, that the inclination of our law is great in favour of marriage; yet this queſtion, it is believed, remains ſtill undecided by the ſupreme court [b].

The voluntary enliſtment of a hired ſervant will be ſuſ-

[a] As ordering one hired as the houſekeeper to dreſs victuals as the cook, &c. On this principle the court of ſeſſion found a houſekeeper entitled to wages and board wages, although ſhe had not been diſmiſſed the houſe; but had voluntarily left it on being allowed no longer to act as houſekeeper, but being deprived of the keys (or, as one judge expreſſed it), the *inſignia* of her office. Chriſtian Gen. June 1801.

[b] In the caſe of ſir George Home againſt Cunningham and Simpſon, which reſpected the enliſtment of an apprentice, one of the judges uſed the illuſtration, "ſuppoſe a woman under "an engagement for perſonal ſervice "marries, ſhe will be free." And in like manner, another reſpectable judge ſtated generally, "that no "perſonal engagement can prevent "a ſervant from marrying." But ſuch obſervations, which are termed by the Engliſh lawyers *obiter dicta*, have not the ſame authority with opinions delivered touching the point which the court is actually deciding. In England, it ſeems to be held that a female ſervant, though ſhe marries, muſt ſtill fulfil the period of her engagement. (Dalt. 58.) And in France, the ſame thing obtains according to Pothier, who ſays, "Quand même ce "ſeroit pour une cauſe honnête qu'un "ſerviteur quitteroit avant le temps "le ſervice de ſon maître, putà, "*pour ſe marier*, ou *pour aller aſſiſter* "*ſes pere et mere*, il ne laiſſeroit pas "d'être tenu des *dommages et intérêts* "*de ſon maître* car c'eſt *par ſon fait et* "*volontairement qu'il ne* remplit pas "ſon obligation: mais ils doivent en "ce cas être eſtimés moins rigoureuſement que lorſqu'il quitte ſans "ſujet, par pareſſe, par libertinage, "ou par l'eſpoir de gagner davantage ailleurs." (Ib. 254.)

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pended till the expiration of his engagement with his maſter, who, ſhould he join his regiment, may compel him to return, *ſqualore carceris*, or may, at his option, inſiſt for damages [a]. For, engagements incompatible with each other, *cæteris paribus*, regulated by the maxim *prior tempore potior jure* [b].

[a] 19th January 1799, John Clerk againſt lieutenant Kenneth Murchiſon, and M'Kenzie againſt Dixon, 1ſt March 1805.

[b] So the law was laid down by the late juſtice-clerk Macqueen in the noted caſe ſir George Home againſt Cunningham and Simpſon, 16th March 1795.

That caſe reſpected the enliſtment of an apprentice, in virtue of the ſtatute 35 Geo. III, c. 9, relative to ſupplying the navy. But the law was laid down generally; and the ſame principle has governed the deciſions of the court in the caſe of ſervants alſo.

In delivering his opinion in this caſe of Cunningham, the lord preſident, who agreed with the lord juſtice-clerk as to the common law, though he differed from his lordſhip as to the conſtruction of the particular ſtatute, obſerved, that he recollected only one caſe to have occurred reſpecting an engagement for perſonal ſervice, and that it had been decided in the bill-chamber in favour of the rights of the maſter.

This caſe of Cunningham was *heard in preſence*, and very maturely conſidered by the bench. The eminent counſel, who argued on the part of the public, maintained, that the right of the king to the military ſervice of the lieges, could not, at common law, be prevented by their engagements with others, whether as ſervants or apprentices. The king, it was ſaid, could compel ſpecific performance *manu militari*. And two of the judges adopted that idea, viz. that "apprentices may be enliſted, becauſe the maſter has no real lien, but only a perſonal claim againſt them for performance. *Prior tempore potior jure*, therefore, does not apply in the caſe of rights ſo diſſimilar as that of a maſter over his apprentice, and his majeſty over recruits."

This argument was therefore completely before the court, and had been ingeniouſly and learnedly maintained from the bar, when the late lord juſtice-clerk Macqueen laid down the law as above mentioned.

This ſame principle was in the late caſe of M'Kenzie againſt Dixon, 1ſt March 1805, maintained very ſtrongly by one learned judge, who, in the caſe of Cunningham, had argued it as counſel from the bar. His lordſhip obſerved, that the oppoſite opinion, as ſuppoſing ſomething like property over the ſervant and his ſervices, was contrary to the principles of the civil law, and the ſpirit of the conſtitutional law of this country; that the right of the crown which differed from that of other maſters, as it could compel ſpe

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AN enliſtment muſt be regulated by the ſame principle with other engagements. The public ſervice, indeed, in general is neceſſary: yet it is not at all neceſſary that any one hired ſervant in particular ſhould enliſt without his maſter's conſent. The onerous obligations of a *bilateral* contract, a ſervant cannot get rid of by *his own* voluntary act.

UNDER the French monarchy, the royal prerogative, and the diſtinction of the military ſervice, were certainly carried to an extreme. But a municipal juriſprudence, built, like our own, on the ſolid learning and enlightened equity of the civil law, corrected and reſtrained the deſpotiſm of the government. The king's ſervice, accordingly, in relation to the onerous contracts of third parties, had no privilege beyond that of any of his ſubjects: the voluntary enliſtment of a hired ſervant ſtood on the ſame footing with any other unlawful engagement [a].

cific performance *manu militari*, or by force of military diſcipline, for reaſons of expediency, weakened and qualified by the mutiny act, ſo as not to interfere with maſters in their right to apprentices with whom they received more than 20l. of apprentice fee; but the other judges obſerved, that all maſters were entitled to enforce ſpecific implement by impriſonment; inſomuch, that a perſon in priſon, *ad factum præſtandum*, has not been thought entitled to the benefit of the *ceſſio*.

This ſeems to be farther confirmed by a clauſe in the militia act, providing, in the caſe of ballots falling upon hired ſervants, that they ſhall be entitled to wages for the time which they have actually ſerved. At the ſame time, in a competition between two maſters, the firſt engagement in point of time, may not always be entitled to a preference; for, if it reſts in *nudis finibus contractus*, and the poſterior engagement has been completed by poſſeſſion, the firſt maſter muſt be ſatisfied with a claim of damages againſt the ſervant. So the court thought in the caſes already mentioned; and ſo far the rule *prior tempore potior jure* cannot have effect.

[a] Quelque favorable que ſoit le ſervice de l'Etat, je crois (M. Pothier obſerves) que le ſerviteur qui quitte avant le temps le ſervice de ſon maître pour s'enrôler volontairement dans les troupes, eſt tenu des dommages et intérêts de ſon maître. Il en eſt autrement du cas où ce ſerviteur ſeroit tombé à la milice: c'eſt en ce cas par une force majeure qu'il n'acheve pas le temps de ſon ſervice; c'eſt pourquoi il ne doit point à ſon maître de dommages et intérêts. De Droit Civil, &c. t. 2, p. 254.

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A MASTER cannot prevent his ſervant from being arreſted either for debt or on a criminal warrant. In ſuch a caſe, has the maſter any claim againſt the ſervant for damages? That queſtion, it is believed, remains ſtill undecided. In the caſe of arreſt on a criminal warrant, M. Pothier makes this diſtinction, that, if judgment go againſt him, he will be liable; but not if he be acquitted. A man certainly does not voluntarily leave his ſervice, who is dragged to priſon, on whatever account; he is not guilty of the offence of leaving his ſervice: yet, in relation to damages merely, the diſtinction ſeems juſt.

INDEED, much deference is due to every thing advanced by that "venerable profeſſor and judge," as he is ſtyled by Sir William Jones, who honours him with this eulogy: "If my undiſſembled fondneſs for the ſtudy of "juriſprudence were never to produce any greater benefit "to the public, than barely the introduction of POTHIER "to the acquaintance of my countrymen, I ſhould think "that I had in ſome meaſure diſcharged the debt, which "*every man*, according to Lord COKE, *owes to his profeſ-ſion*[a]."

WAGES.

SERVANTS wages are not arreſtable, except as to any ſurplus beyond what is neceſſary to maintain them in a condition ſuitable to their ſervice[b]. Like phyſicians fees, funeral charges, and other privileged debts, the wages (for the current term) of menial ſervants[c], and thoſe kept for the pur-

[a] Law of Bailments, 29.

[b] Erſk. b. iii, t. 6, § 7.

[c] In the Dict. v. Privileged Debt, it is ſaid, "ſervants' fees are ſo far "privileged, that they may warrantably be paid before confirmation or diſſolution of the family to free the executors; *but not being paid, they were found no privileged debts.*" Gosford, 24 Nov. 1675. And lord Dirleton, in reporting the ſame caſe, ſays ſtill more generally, "it was "found that a ſervant for his fees is "not privileged and preferable to "other creditors." Dec. 302. But it is material to obſerve that, in that caſe, the ſervant was claiming a preference, not for the current term's

pose of husbandry, are preferable debts[a]. This preference has not been extended to the wages of mechanical ser- § 2. VOLUNTARY —WAGES.

vages, but for arrears, as appears from lord Gosford's report, which is as follows, "alleged that being a *ser-* "*vant for many years* to James Mas- "terton, and to his wife *after his de-* "*cease*: for which he had obtained "decree, that he ought to be prefer- "red to the creditors." (See MS. in the Advocates Library.) He was claiming a preference on his deceased master's effects, for those bygone wages contained in the decree.

At any rate, if this distinction ever obtained, it was soon dropt. In the case of Crawford, Nov. 25, 1680, reported by lord Stair, servants were found preferable in a competition, Crawford obtained decree against Hutton, as intromitter with the defunct's goods, for payment of the defunct's funeral charges, and servants' fees, and some furnishing, to the defunct. Hutton suspended pleading, that "as *executor creditor*, he was pre- "ferable for his own debt to the "charger." *Answered*, "That funeral charges and servant's fees are "privileged debts, preferable to all "other creditors, whether they con- "firm themselves executors or not. "The lords preferred the funeral "expences, and a year's fees of the "servants, which came current at "the defunct's death, and the term "not come, unless the suspender in- "structed, that the servants were "only feed for half years, in which "case only they preferred the cur- "rent term; but as to the other fur- "niture, preferred the executor cre- "ditor, and found him liable for the "surplus, if any were." Lord Stair, quoting this decision, lays down the law generally, "executors may safe- "ly pay funeral expences, compre- "hending medicaments to the de- "funct, because these have a privi- "lege from the common obligation "of humanity to the dead, and, "therefore, are preferable to all other "debts of the defunct, and so may "be paid at any time. Dec. 16, 1674. "L. Kelhead. Servants' fees for a "year, or term as they are hired, "and a term's house mail, or drugs "to the defunct on death bed, have "the like privilege." B. 3, t. 8, § 72. Lord Bankton says, "that a servant is "preferable on the executry for his "current wages." (B. 1, t. 2, § 55.) And Lord Kilkerran, v. Privileged debt, observes, "house rent for one "year, found to be a privileged debt "on the same principle with a ser- "vant's fee." In like manner, Mr. Erskine, among other privileged debts, mentions, "servants wages either for "a full year, or half a year, accord- "ing to the time for which they "were hired." (B. 3, t. 9, § 43.) So that the point may be supposed to be settled on these concurring authorities.

[a] 23d Jan. 1779, Alexander Melville against James Barclay. (N. B. The court ordered the following state of the question betwixt these parties, with their judgment upon it, to be inserted in the books of sederunt.)

In a competition among the arrest-

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vants [a]; nor of the overſeer of a diſtillery [b]; but the r who have been employed on days wages to cut dow corn were found preferable to the other creditors [c].

SERVANTS wages fall under the triennial preſcrip Each term's wages run a ſeparate courſe. But our preſcriptions, different from the long preſcription, a

ing creditors of a bankrupt tenant upon the price of his effects, which had been ſold by authority of the ſheriff, a queſtion having occurred, how far the wages due to the farm ſervants of a bankrupt tenant, for the term current at the bankruptcy, were to be conſidered as privileged debts, and preferable to arreſters? The lords, before anſwer, ordained an inquiry to be made into the practice of the ſheriffs of the different counties of Scotland as to that point. And reports having been accordingly received of ſaid practice from the ſheriffs of Edinburgh, Eaſt-Lothian, Perth, Ayr, Aberdeen, Lanark, Roxburgh, Renfrew, Dumbarton, Dumfries, Selkirk, Roſs, and Kincardine, the lords, yeſterday, proceeded to take the ſame into conſideration; and thereafter pronounced an interlocutor, finding, that the wages due to the ſervants of a bankrupt tenant, that is, to the ſervants kept for the purpoſes of the farm, are privileged debts on the price of the bankrupt's effects, and are preferable to arreſters.

[a] Dict. vol. ii, Privileged debt.

[b] Jan. 31, 1781, White againſt Chriſtie.

Chriſtie having been appointed factor on the ſequeſtrated eſtate of James Small, a bankrupt ten who likewiſe exerciſed the a wright, and employed ſer both theſe capacities, applie court, by petition, praying authorize a diviſion of th among the ſeveral creditors cularly, the landlord, the f vants, and the mechanical ſer

The lord ordinary on t "found, that, on the procee "ſtocking, the landlord wa "able *primo loco*, the labour "vants *ſecundo loco*, to the e "half a year's wages; but "ſervants, the artizans, wer "be ranked as common cred

A petition, reclaiming ag judgment, was refuſed by t without anſwers.

[c] 3d February 1789, Ridd Haig's creditors. Fac. Col.

[d] Paterſon's petition, N Obſerved from the bench.— cutting down the grain muſ for their trouble, before t thereof can be divided by t tors. Their preference ari the nature of the thing, not act of ſederunt; and one ju ſidered them preferable ev landlord's hypothec.

[e] Erſk. 565, 17.

as from the Engliſh ſtatutes of limitation, are founded on the preſumption of payment, which, therefore, it is always competent to refer to the debtor's oath, or to diſprove by his writ. § 2. VOLUNTARY — APPREHENTICES.

A DUTY is payable for each male ſervant, at a rate which riſes in proportion to their number. This tax commenced during the American war. It was afterwards farther modified, and its execution intruſted to the commiſſioners of exciſe. On this tax firſt one additional 10 per cent., and then another additional 10 per cent. was granted. After farther alterations by three ſubſequent ſtatutes, this tax, together with the whole aſſeſſed taxes, preſently ſtands as ſettled by the general ſtatute, 43 Geo. III, c. 161 [a].

APPRENTICES (excepting poor pariſh children, or other children by any public charity) can be bound only by written indentures, on ſtamped paper, containing the true date and premium given by the apprentice for inſtruction in the art and myſtery [b].

[a] It ſeems not neceſſary to enter into any detail of particulars. Revenue acts ſeldom remain any time without alterations; and an abſtract is given in the yearly almanacks. Only in the caſe of gardeners, it will be obſerved, that if the perſon is employed either under a head gardener, or in a garden not requiring the conſtant labour of one perſon, the duty is only 5l.; and even this is not exigible from any perſon employed by the day or week, to work as a day-labourer, at the uſual rate of wages for day-labourers in agriculture in any garden belonging "to a dwelling-"houſe, and exempted as ſuch from "the duties mentioned in the act, (ſchedule B.) "or in any garden be-"longing to a dwelling-houſe not "chargeable to the duties mentioned "in the ſaid ſchedule, ſuch garden "not requiring the conſtant labour "of one ſuch labourer."

[b] The duties on ſtamped paper, which were the ſubject of "numer-"ous, intricate, and complicated, en-"actments," are now contained in one ſtatute, 44 Geo. III, c. 98, § 8. The ſtamp duty on the indenture varies (from 14s. to 19 guineas) as the premium is more or leſs, according to a table to be ſeen in the yearly almanacks. Beſides, for every apprentice, where the premium is above 20l., the maſter pays 1l. 1s. per annum, under the 43 G. III, 161.; and for two or more, 2l. 2s. each.

§ 2. VOLUNTARY.—APPRENTICES. Printed indentures.

INDENTURES ought to be regularly executed; that is, before witneſſes, whoſe deſignations, and that of the writer ought to be inſerted in the teſting clauſe. In the caſe of printed indentures, the perſon who fills up the blanks muſt be mentioned[a].

INDENTURES being generally entered into by perſons under age, are therefore ſubſcribed by the father, or guardian likewiſe, who "takes burden" for the apprentice duly performing the ſervice ſtipulated. But the apprentice himſelf may be compelled by impriſonment to ſerve out his time[b].

§ 3, 42, Geo. III, c. 73.

III. IN order to ſecure the health, education and morals of children employed in large manufactories, a ſpecial ſtatute has been framed; and its execution is intruſted to juſtices of the peace. This valuable enactment is appointed to be hung up in every manufactory, that it may be generally known. Here, therefore, it is only neceſſary to give a ſummary of its moſt important regulations.

[a] 8th December 1804, Buchanan, Hopkirk, and Company, againſt William Guthrie and ſerjeant Love.

Guthrie, with his uncle as his cautioner, in October 1802, became bound for ſeven years as apprentice to Buchanan, Hopkirk, and Company. In September 1804 he enliſted. His maſters reclaiming him, he pleaded the nullity of the printed indenture, which did not mention the name of the perſon who had filled up the blanks. Anſwered—That the plea was barred by homologation. Here the ſerjeant, with whom he had enliſted, replied, that he, as a third party, could not be affected by ſuch homologation. The ſheriff "found the indenture defective in "the ſolemnities required by law "and that the maſter had no right "to claim Guthrie as an apprentice." A bill of advocation of this judgment was paſſed. Some of the court preſſed doubts how far homologation while the boy was under age, could take place.

[b] In England, it is held that infants cannot be bound by their indentures beyond the age of twenty one years. "Every indenture of an infant is "void at his election; and, in all "caſes, the maſter muſt truſt to the "covenant of thoſe who engage for "the infant." Lord Kenyon, C. 5 term, rep. 715.

[c] 42 Geo. III, c. 73.

THE act includes all mills and factories where three apprentices or twenty perſons are employed [a]. In order to prevent injury to the health, it lays down regulations for inſuring a ſupply of freſh air; for keeping the apartments warm [b]; for the proper clothing of the children [c]; for preventing their being over-wrought, or at unſeaſonable hours [d]; for medical attendance [e]; for inſtructing them in reading, writing, and accounts [f]; for inſtructing them in the principles of the Chriſtian religion, and making them attend divine ſervice on the Sunday [g]. § 3. 42 Geo. III, c. 73. —APPRENTICES. Health. Education.

JUSTICES of the peace are directed, at their mid-ſummer meeting, yearly, to appoint two inſpectors of the mills and factories, within their reſpective diſtricts, to report their ſtate to the quarter-ſeſſions [h]. The mills and factories muſt be regiſtered with the clerk of the peace. Juſtices of peace appoint inſpectors.

THESE regulations are enforced by penalties, viz. any ſum not exceeding 50l. ſterling, nor under 5l. for obſtructing the viſitors or inſpectors [i]; and for maſters offending againſt this act, any ſum from 5l. to 10s.; which penalties go, one half to the informer, and the other to the miniſter and elders, for behoof of the poor of the pariſh [k]. But the action preſcribes in one month [l]. Penalties.

AN extraordinary juriſdiction is veſted in any two juſtices of peace, for the recovery of theſe penalties. The mode of proof is either the confeſſion of the parties, or oath of one credible witneſs [m]. The decree is enforced by diſtreſs and ſale, or, if diſtreſs cannot be found) by impriſonment in the common gaol or houſe of correction, for any time not exceeding two months [n]. Two juſtices. One witneſs, or confeſſion.

[a] § 1.
[b] § 2.
[c] § 3.
[d] § 4 and 5.
[e] § 10.
[f] § 6.
[g] § 8.
[h] § 9.
[i] § 13.
[k] Ib.
[l] Ib.
[m] § 13.
[n] Ib.
The warrant of diſtreſs ſhall not be

§ 4. 42 Geo. III, c. 73. —WAGES.

IV. WE had formerly occaſion to mention the juriſdiction which Scottiſh juſtices of peace have always been in the practice of exerciſing with reſpect to the fixing "the wages "of labourers, workmen, and ſervants [a], the prices for all "handicrafts [b]," and the wages of craftsmen or artiſans, within borough [c].

Statutory juriſdiction thereia.

THIS very delicate juriſdiction they have hitherto exercised with much diſcretion. Queſtions between the maſter and their journeymen, touching the rate of wages, have frequently been remitted by the Supreme Court to the juſtices of the peace, as having better acceſs to take the neceſſary information in the firſt place [d]; and, in ſuch queſtions, they have been reſorted to in the firſt inſtance, and have made ſuch allowance as the expence of living and other circumſtances of the caſe rendered neceſſary. If either party be diſſatisfied with the judgment of the juſtices, the queſtion then comes, properly prepared, before the ſupreme tribunal.

Menial ſervants.

THE ſtatutes for the regulation of wages, do not extend to menial ſervants; "it being impoſſible for any magiſtrate "to be a judge of the employment of menial ſervants, or "of courſe, to aſſeſs their wages [e]." A menial ſervant, therefore, on the one hand, may exact, and the maſter, on the other, may offer, what wages he pleaſes. In like manner, the former may ſtipulate to give the maſter no obedience except in his particular department; and the latter may inſiſt on his being generally ſubject to his command.

combining,

YET, were a number of menial ſervants, on the one hand

iſſued until ſix days after conviction. The decree cannot be removed into any court by advocation. But it may by ſuſpenſion or reduction.

[a] Vol. i, p. 104; and App. I, p. 1.

[b] App. I, ib.

[c] Vol. i, p. 106.

[d] Caſe of the printers, 1804, Nov.

[e] Blackſtone, b. i, c. 14, 92.

or of maſters, on the other, to combine, ſuch combination, whether on the part of the ſervants or of the maſters, would be puniſhable at common law. § 4. 42 Geo. III, c. 73. —WAGES.

THE moſt common combination is that of journeymen to obtain an advance of wages. By the common law, any one workman may refuſe to work till he be paid the price he pleaſes to fix upon his own labour: But if two or more enter into an agreement of this kind, the common law will puniſh ſuch aſſociations, as being injurious to the intereſts of the public [a]. for advance of wages.

DR. SMITH remarks, that we hear much of the combination of journeymen, but little of that of the maſters [b]. Common law, however, reprobates and puniſhes combinations in the one deſcription of perſons as well as in the other.

SUCH combinations, as an offence againſt the common law, are triable by the ſeſſions, who may inflict the puniſhment of fine and impriſonment. If a ſeverer puniſhment be deemed neceſſary, the aggravated caſe may be tried before the judge ordinary, who employs a jury, or before the court of juſticiary. Combinations puniſhable at common law. By what courts triable.

V. IN England, combinations among workmen having become frequent and alarming, a general enactment reſpecting combinations was thought neceſſary, in aid both of previous ſtatutes, which reſpected only particular claſſes of workmen, and of the common law. The firſt attempt of this kind was by the 39 Geo. III, c. 81, which was ſoon after ſupplanted by § 5. 39 & 40 Geo. III, c. 106. —COMBINATION.

[a] Juſt as by the civil law thoſe were puniſhable—"qui illicitis habitis conventionibus conjuravere ut *ne quis, quid alteri commiſſum ſit, opus implent, aut injunctam alteri ſolicitudinem alter intercipiat*; or, *ut* ſpecies "*diverſorum* corporum negotiationis "*non minoris quam inter ſe ſtatuerunt* "*venundentur.*" (Cod. de Monop. et conventu illicito, &c.)

[b] Wealth of Nations, B. 1. c. 8

§ 5. 39 & 40 Geo. III, c. 106. —COMBINATION. the 39 and 40 Geo. III, c. 106, which, however, does not repeal or abridge the powers which justices had previously, touching combinations [a]; but, in addition thereto, creates an extraordinary jurisdiction in any two justices, not being masters in the trade in which the offence is said to have been committed [b]. It is optional, therefore, either to take the benefit of this statute, or to bring the prosecution upon some previous act, which may relate to the particular case, or before the justices or judge ordinary, upon what may be termed the common law jurisdiction.

Offences. THE offences punishable by this statute are, all combinations touching the rate of wages, and the quantity of work or power of working [c]. The punishment varies with the degree of criminality. For combining to lower the wages, or alter the hours of working, the penalty is 20l. or confinement in the common gaol or correction house within the jurisdiction of the justices, for any time not exceeding three, nor less than two calendar months; for contributing for any expences incurred in acting contrary to this act 10l.; for collecting or receiving such money, 5l. or confinement in the common gaol for three calendar months, or in the correction house, at hard labour, for two [d]; for combining to raise the wages [e], or endeavouring to prevent any unhired person from hiring himself with any manufacturer [f], or to persuade him to leave his work [g], for any purpose contrary to the provisions of this act, or the attending, or making any person attend, any meeting held for such illegal purpose [h], the punishment is confinement in the common gaol for three, or in the correction house, to hard labour, for two, calendar months.

Punishment.

Recovery of penalties. THE pecuniary penalties are recoverable by distress and

[a] § 14. [b] § 16. [c] § 3, 4, 5, 17. [d] Ib. [e] § 2. [f] § 3. [g] § 3. [h] § 4.

ſale; and where no diſtreſs can be found, the confinement takes place as reſpectively above mentioned [a]. § 5. 39 & 40 Geo. III, c. 106.

—COMBINATION.

THE proof is by confeſſion of party, or oath of one credible witneſs [b]. Offenders are indemnified on giving evidence againſt others [c]. This proof and conviction may take place in the offender's abſence, if he cannot be apprehended [d]. On complaint or oath, any one juſtice may grant warrant for citing him at a certain day and place, before any two juſtices. In caſe of his not then appearing, and of oath being made to the ſervice of the ſummons, at leaſt twenty hours before the diet of appearance, perſonally, or at his uſual place of abode, theſe juſtices ſhall iſſue their [e] warrant for apprehending him; or, without iſſuing any previous ſummons, they may at once grant warrant for apprehending him; and, if the offender appear, or if oath be made of his abſconding, they may proceed in the cauſe. They may commit witneſſes for refuſing to appear, or give evidence. Convictions and commitments are drawn up in the form of a ſchedule [f]; they muſt be tranſmitted to the next quarter ſeſſion to be filed.

Proof.
Oath of party.
One witneſs.

APPEAL is competent to the next quarter ſeſſion, on finding ſecurity, the offender in 10l. and two ſureties in 5l. each, that he ſhall be forthcoming to abide judgment. The judgment of the quarter ſeſſions is final.

Appeal.
Quarter ſeſſions final.

[a] In Scotland, confinement in the correction houſe ſuppoſes hard labour. This does not appear to be the underſtanding of ſome Britiſh acts, which do not require the impriſonment in the goal to be double the duration of that in the correction houſe, unleſs where the words "to "hard labour" are expreſsly added.

[b] § 2, 3, 4, 17.

[c] § 9.

[d] § 10, 11.

[e] In the act, it is *their* or *his*: This ſeems an inaccuracy. The only antecedent is the *two juſtices*; and the meaning of the ſtatute ſeems to be, that the warrant for ſummary apprehenſion ſhould be granted by two. § 10.

[f] App. 11.

§ 5. 39 & 40 Geo. III, c. 106. —COMBINATION. Immediate commitment when?

IF the conviction be affirmed, the appellant, if he does not pay the forfeiture or penalty, and costs, or, if the judgment contained a warrant of imprisonment, shall be immediately committed to gaol, or house of correction, agreeably to the judgment, without bail, and also till payment of the costs.

CLAUSES 18—22, inclusive [b], are expressly limited to England. The other enactments, being worded generally, must extend over all the island. Yet the phraseology is entirely English. Neither the word Scotland, nor any technical term of our law, occurs from beginning to end of the statute. Some of its regulations, therefore [c], cannot be carried into effect in this country [d]. Prosecutions must be brought within three calendar months after the offence has been committed.

§ 6. 43 Geo. III, c. 151. —COTTON WEAVERS.

VI. As already observed, that part of the 39 and 40 Geo. III, c. 106, which regarded the settlement of disputes between masters and servants by arbitration, was confined to England. The statute, therefore, 43 Geo. III, c. 151, was

[b] Touching the settling of disputes between masters and workmen by arbitration.

[c] Clauses 6 and 7.

[d] For example, money subscribed for purposes prohibited by the statutes is made recoverable by actions before the courts at Westminster; to which, however, persons resident in Scotland are not amenable. In Scotland, therefore, such sums cannot be recovered under the statute at all.

The little attention to the peculiarities of our law, that appears in the phraseology of this, and indeed most of the other British enactments, touching disputes between masters and workmen, is not perhaps very much to be regretted. In England, those statutes certainly may be expedient and necessary; but Scottish magistrates have jurisdiction to restrain the same offences, at common law. Complaints, therefore, in such cases, are generally laid on the common law as well as on the statutes; and are followed out in virtue of the former, as their English phraseology seldom makes it possible to execute the latter. The oath of one witness, and the party's confession are indeed new means of proof. But whether we derive any benefit from such innovations, opposite to the principles of our common law, has been doubted.

framed for the purpoſe of ſettling, with us, in the ſame expeditious manner, diſputes between maſters and weavers in the cotton manufacture, and perſons engaged in ornamenting cotton goods by the needle. As this ſtatute is framed for this country alone, it is inſerted in the Appendix I. Here, therefore, a very general analyſis will ſuffice.

§ 6. 43 Geo. III, c. 151 —COTTON WEAVERS.

In caſe of any application to any one juſtice, touching any diſpute between a maſter and thoſe employed by him in the cotton manufacture, he is directed to ſummon the defender on a certain day, not exceeding two days, excluſive of Sunday; and, in caſe of his not appearing, or not ſettling the diſpute, the juſtice is then to nominate referees, one a maſter or foreman, the other a workman. Both parties have two peremptory challenges [a]. The form of the nomination is contained in ſection firſt. The periods within which the complaint muſt be made [b], places of meeting [c], penalty on perſons not attending [d], the term within which the referees (or if they fail to do ſo, the juſtices [e]) muſt ſettle the diſpute, are all ſtated very diſtinctly in the act. The determination of the juſtice is not reviewable [f]. The juſtice may decide the diſpute on the repreſentation of one referee [g]; and, if the perſons named by him do not chooſe to act, he may appoint other referees [h]. In every caſe of a ſecond nomination, the referees muſt meet within twenty-four hours; and the expence of the application muſt be borne by the party, the default of whoſe referee made it neceſſary [i]. If ſuch ſecond referee does not attend, the other may give an award, which ſhall be final [k]. In like manner, the referees may proceed, notwithſtanding the abſence of one or both of the parties [l]. The penalty of witneſſes not attending [m]; the power of the parties to extend

One referee.

If thoſe named will not act.

Second nomination.

Abſence of a referee.

Witneſſes.

[a] § 1. [b] § 2. [c] § 3. [d] § 4.
[e] § 5. [f] § 5. [g] § 1. [h] § 7.
[i] § 7. [k] § 8. [l] § 10. [m] § 9.

§ 6. 43 Geo. III, c. 56. —COTTON WEAVERS. Award. Bankruptcy, children, &c.

the period of the award [a]; the mode of writing the awar and the acknowledgment of the fulfilment of it [c], and penalty for not fulfilling it [d]; the mode of proceeding caſes of bankruptcy [e]; and, in the caſe of complaints by m ried women or infants [f], how coſts ſhall be aſcertained the fees or expence of the procedure [h]; what meaſure ſ be the rule [i], are all ſpecified in the reſpective clauſes.

Ticket.

IT is farther ordered, that, with every warp given out a manufacturer to a workman to be wove, there ſhall be livered a ticket, denoting the work to be done, adapted each branch of the manufacture, ſtating the quantity fineneſs of the warp, in plain warps, whether white or loured; and, in all caſes, the quantity and denominatio the work to be performed, and the rate and price to be formed for the ſame [k]; and, in the caſe of new patterns, cifying the manner the workman is to be paid for mountin This ticket is evidence of all matters which it mention The penalty for refuſing to give it is not to be under nor more than 10s. [m]; againſt which there is no appeal.

—ORNAMENTING WITH THE NEEDLE. Referees. Appeal. Review.

THE ſecond part of the ſtatute relates to diſputes betw weavers and perſons employed by them in the ornamen of cotton goods with the needle. The only difference is, in this caſe, there is not, as in the former caſe, a nomina of a referee for each, viz. one a maſter, and the othe journeyman. The juſtice appoints two referees, both them manufacturers, foremen, or other perſons, as pleaſes [o]. In other matters, the procedure is preciſely ſame as above. Either party may appeal to the quarter ſions, on giving immediate notice of ſuch appeal, and fi ing ſecurity, himſelf in 10l. and two ſureties in 5l. each, proſecute ſaid appeal [p]. The judgment of the ſeſſions is f

[a] § 11. [b] § 12. [c] § 13. [d] § 1b. [e] § 15. [f] § 16. [g] § 17. [h] § 1 [i] § 19. [k] § 20. [l] § 22. [m] § 20. [n] § 21. [o] § 23. [p] § 25.

and concluſive. No bill of advocation or ſuſpenſion ſhall be competent. The ſtatute does not ſay that a reduction is not competent. No maſter cotton weaver ſhall act as a juſtice [g]. Proceedings are not to be quaſhed for want of form. § 6. 43 Geo. III, c. 56. —COTTON WEAVERS. Maſter cannot judge.

THIS ſtatute concludes with a reſervation in favour of all former ſtatutes, relative to the power of juſtices of peace, and particularly 1 Anne, ff. 2, c. 18 [h]; 13 Geo. II, c. 8; 22 Geo. II, c. 27; and 23 Geo. II, c. 13, § 9; and 17 Geo. III, c. 56; which we will have occaſion to notice in the next ſection. Reſervation in favour of former ſtatutes.

VII. THE Britiſh ſtatute-book contains a multiplicity of enactments touching all the different claſſes of manufacturers and workmen. Statutes in theſe caſes have not been framed for Scotland in particular: Yet thoſe other ſtatutes, for the reaſon above mentioned, are often not intelligible in this country. Therefore they are ſeldom reſorted to; complaints being generally laid on the common law alſo; in virtue of which our magiſtrates find themſelves in moſt caſes, competent to attain the object of thoſe enactments without their aid. However, being moſt of them expreſſed generally, they are of courſe obligatory here alſo; ſo far, at leaſt, as their excluſive adaptation to the peculiarities of a foreign law, happens not to make it impoſſible to execute them. On this account, and as their execution is intruſted principally to juſtices of the peace, they cannot be omitted in a treatiſe on the juriſdiction of that magiſtracy. § 7. BRITISH STATUTES.

BESIDES their foreign phraſeology, another circumſtance, which diſcourages our magiſtrates from intermeddling with them, is their immenſe number, and their multiplied differences in minute particulars, which do not appear to be go-

[g] § 28.

[h] This is an Engliſh ſtatute, but expreſsly extended to Scotland by 13 Geo. II, c. 8.

§ 7. BRITISH STATUTES.

verned by any general rules. This obſcures and perp branch of law, which, to be uſeful, ought to be fam all; to maſters, and ſervants, and magiſtrates to apply ſpur of the moment. But the legiſlature has not thou by one or two general ſtatutes, to lay down rules for variety of manufacturers. On the contrary, this part of tute-book wears ſuch an aſpect, as if each particular ena like a private act, had been paſſed *periculo petentis*, with ſufficient examination either of general principles or enactments. Hence, where the offence is the ſame, for one juſtice, ſometimes two juſtices, have juriſdiction; times the puniſhment is one thing, ſometimes another it is not eaſy to ſay why it was not *mutatis mutandis*; or why the ſtatutes were not, in ſuch particulars, one ſame. And, as thoſe enactments have been repeat plained, altered, amended, there is ſcarcely any one manufacture that is not the ſubject of as many ſtat would form a bulky code for the whole. Thus, enactments have been paſſed touching ſilk maſt workmen [a]; clothiers and their workmen [b]; maſt ſervants in the woollen, linen, fuſtian, cotton, and i nufactures [c]; in the leathern manufactures [d]; perſ ployed in the making of hats, furr, hemp, flax, and manufactures [e]; in the bone and thread lace manufa the clock and watch makers [f]; paper makers [g]; perſ

[a] 13 and 14 Car. II, c. 15, § 6; 20 Car. II, c. 6; 8 and 9 Will. c. 36. Theſe, being Engliſh acts, cannot have any force in this country, unleſs ſpecially extended, which has ſometimes been done:—22 Geo. II, c. 27; 32 Geo. III, c. 44.

[b] 4 Edw. IV, c. 1, 7; J. 7; 13 Geo. ff. 2, 6, 15; 13 G. c. 23, 30; 29 Geo. II, c. 33; 30 Geo. II, c. 12; 14 Geo. III, c. 25.

[c] 1 Anne, 1, 2, c. 18; 22 II, c. 8; 22 Geo. II, c. 27.

[d] 13 Geo. II, c. 8.

[e] 22 Geo. II, c. 27; 14 G 44; 15 Geo. III, c. 14; 17 c. 56; 22 Geo. III, c. 40.

[f] 19 Geo. III, c. 49.

[g] 27 Geo. II, c. 7.

[h] 36 Geo. III,

iprisonment; which, in point of *quantum* and duration, various as the enactments themselves. Where the case is it, imprisonment is sometimes aggravated by hard in the correction house; sometimes the fine goes to ng, sometimes to the poor; sometimes it is divided metimes in one proportion, and sometimes another) he informer. And where no fine, properly so called, cted, the justices are authorized to award a sum in of damages, and sometimes double, and sometimes tri- real damages, by way of forfeiture; and payment is ed by imprisonment. Fine and imprisonment. Damages.

IPPING is another punishment appointed by those sta- be summarily inflicted on offenders; sometimes, too, justice; on the oath, and sometimes (in the case of s) on the solemn affirmation, of a single witness. This n regretted and disapproved of by judge Blackstone, her writers, as equally inexpedient and unconstitu- And, in the present reign, the inclination seems for- y to be to dispense with this base and infamous pun- t, and rather increase the severity of imprisonment; nes by solitary confinement, sometimes by hard labour. ich salutary purpose, later statutes have been enacted, ltering earlier ones. Some of these later statutes still corporal chastisement; but they make this important Whipping.

§ 7. BRITISH STATUTES —PUNISHMENTS.

it does not already find, it renders, hardened and incorrigible.

DEATH.

THOSE ſtatutes farther puniſh ſome offences capitally; as the breaking, by night or by day, into any houſe or ſhop, to cut or deſtroy any woollen goods, or tools [a], or any ſilk [b], or linen or cotton manufacture, or tools [c].

Tranſportation.

TRANSPORTATION, the next puniſhment in ſeverity, is appointed in the caſe of any perſon aſſaulting any maſter wool-comber, maſter weaver, or other perſon concerned in the wool manufactory [d]; which proviſion is extended to journeymen dyers, hot-preſſers, and all other perſons employed in the woollen manufactory; and alſo to journeymen, ſervants, workmen, and labourers, in the making of felts or hats, and in the manufacture of ſilks, mohair, fur, hemp, flax, cotton, mohair or ſilk, or of any of the ſaid materials mixed one with another [e]; or for any perſon ſending any letter or meſſage to any maſter wool-comber, or

[a] 22 Geo. III, c. 40, § 1.

[b] § 2.

[c] § 3.

In all theſe clauſes of this ſtatute the expreſſion is, ſhall be "felony without benefit of clergy." This is neither common Engliſh language nor the technical language of the Scottiſh law. As an antiquary or ſcholar, a Scottiſh judge may underſtand its meaning. But, ſitting on a Scottiſh bench, he is not entitled to underſtand it. Having no legal meaning in our law, it cannot be applied. The preſumption is, that had the legiſlature intended to inflict a capital puniſhment in this country, they would not have ſpoken a language which we do not underſtand; and, by the explanation of the phraſe, the moral ſenſe of the people would not be much ameliorated. This preſumption is increaſed by the example of other ſtatutes, which, in the caſe of Scotland, uſe the expreſſion "ſhall be puniſhed with death." The preſervation of our municipal law, at the union, would not have been of any ſignificancy, had it been underſtood, that we were to learn the technical phraſeology of the Engliſh law. It would have been experiencing the inconveniences of both ſyſtems without the advantages of either.

[d] 12 Geo. I, c. 34, § 6.

[e] 22 Geo. II, c. 27, § 12.

other perſon employed in any of the above trades, or pulling down or deſtroying any of their out-houſes, trees, or maiming their cattle, for not complying with any demands of their workmen [a]. § 7. BRITISH STATUTES —PUNISHMENTS.

THE form and manner of exerciſing this juriſdiction are equally various. Sometimes one juſtice, ſometimes two, are empowered to act. Sometimes their award is final; ſometime it is reviewable in one way, and ſometimes in another [b]. —PROCEDURE.

THE chief offence is unlawful combinations. But the general ſtatute, 39 and 40 Geo. III, c. 106, though it does not repeal, yet ſeems very much to ſuperſede the numerous enactments reſpecting combinations in the different trades: as, for example, 2 and 3 Edw. VI, c. 15; 12 Geo. I, c. 34, touching wool-combers;—22 Geo. II, c. 27; 17 Geo. III, c. 593; and 36 Geo. III, c. 111; touching paper makers. —OFFENCES. Combination.

EMBEZZLEMENT and other frauds, are the ſubject of various enactments applicable to the different trades, as in the caſe of the ſilk-workers [c]; clothiers [d]; of the woollen, linen, Embezzlement, fraud, &c.

[a] 22 Geo. II, c. 27, § 12.

"The perſon lawfully convicted thereof upon an indictment, to be found within twelve months; after any ſuch offence, ſhall be adjudged guilty of felony, and ſhall be tranſported for ſeven years to ſome one of his majeſty's colonies.

[b] In the 8th Geo. III, c. 56, the following clauſe occurs: "that no order "touching the matter contained in "this act, nor any proceedings to "be had touching the conviction of "any offender againſt the ſaid act of "the 22 of Geo. II. or this act or "ſhall be quaſhed for want of form, "be removeable by *certiorari* into his "majeſty's court of king's bench."

It is clear, that whatever may be ſuppoſed from analogy to be the intention of the legiſlature, this clauſe cannot exclude the ordinary review of the court of ſeſſion.

[c] By the 13 and 14 Car. II, c. 15, every ſilk winder and doubler, who ſhall unjuſtly, or deceitfully and falſely, purloin, embezzle, pawn, ſell, or detain, any part of ſilk delivered to them to wind or double, in every ſuch caſe, as well the winder or jour-

§ 7. BRITISH STATUTES —OFFENCES.

neyman ſo offending, as the buyer and receiver thereof, being lawfully convicted, by confeſſion, or oath of one witneſs, before one juſtice (or mayor), ſhall render to the party grieved ſuch ſatisfaction for his damage and loſs and charges, as the juſtice ſhall order. § 6.

But no more damages ſhall be given, than the party grieved ſhall prove he is damnified, and hath expended; and if the party ſhall not be able, or do not make recompence in 14 days after conviction, he ſhall for the firſt offence be apprehended and whipped, or ſet in the ſtocks, where the offence was committed, or in ſome market town near, in the ſaid county; and for the ſecond offence, to incur the like, or ſuch further puniſhment, by whipping or being put in the ſtocks, as ſuch juſtice ſhall think convenient. § 7.

And by the 20 Car. II, c. 6, if any ſilk winder or doubler ſhall be found faulty, in unjuſtly, deceitfully, or falſely, purloining, embezzling, pawning, ſelling, or detaining, any ſilk committed to his truſt; any juſtice, or mayor, ſhall immediately on conviction by confeſſion, or oath of one witneſs, commit him to priſon or to the houſe of correction, till ſatisfaction be given to the party wronged, or puniſhment inflicted as by the 13 and 14 Car. II, is appointed.

And by the 8 and 9 Will. c. 36, every perſon that ſhall embezzle, pawn, ſell, or detain, any ſilk delivered to him to be wrought, or after it is wrought up, and alſo the receiver and buyer thereof, or ſuch as take the ſame to pawn, ſhall be ſubject to all the penalties of the 13 and 14 Car. II, c. 15, and the 20 Car. II, c. 6.

And by 32 Geo. III, c. 44, if a perſon ſhall buy, receive, accept, take, by way of gift, pawn, pled ſale, or exchange, or in any ot manner whatſoever, from any per employed to work up the ſilk ma facture, or ſilk mixed with other terials, any ſilk, whether the ſame or be not firſt wrought up, and w ther the ſame be or be not mi with other materials, knowing ſ perſon to be ſo employed as aforeſ and not having firſt obtained the c ſent of the perſon ſo employing h or whether any ſilk ſhall have b purloined or embezzled by any ſon, ſhall buy, receive, accept or t from any perſon, any ſuch ſilk, w ther wrought or unwrought, mi or unmixed, knowing the ſame have been purloined or embezz the perſon ſo buying, receiving, cepting, or taking, any ſuch ſilk, be proceeded againſt as directed 22 Geo. II, c. 27, and 17 Geo. c. 56, or may be proſecuted fo miſdemeanour, and puniſhed by impriſonment, or whipping, as ſeſſions, (who are impowered to ſuch offenders), or other court, w tried, may think fit, although proof upon ſuch trial be given whom ſuch ſilk doth belong. § 4.

And if any perſon ſhall ſell, pa pledge, exchange, or otherwiſe lawfully diſpoſe of any ſilk, wro or unwrought, mixed or unmi knowing the ſame to have been purloined or embezzled; he ſhall liable to the ſame puniſhment as ſons convicted of receiving purlo or embezzled ſilk would be liabl by virtue of this act. § 5.

And by the 22 Geo. III, c. 40 any perſon ſhall, by day or ni break into any houſe or ſhop, w

§ 7. BRITISH STATUTES —OFFENCES.

ment to cut or deſtroy any velvet, wrought ſilk, or ſilk mixed with any other materials or other ſilk manufacture, in the loom, or any warp or gum, tools, tackle, or utenſils; or wilfully and maliciouſly cut, break, or deſtroy the ſame, he ſhall be guilty of felony without benefit of clergy. § 1.

By the 14 Geo. III, c. 25, if any picker, ſcribbler, ſpinner, or waver, or other perſon employed in the manufacturing of woollen cloth, or in preparing materials for that purpoſe, ſhall not return all working tools or implements wherewith he ſhall be intruſted, and all wool, yarn, chain, woof, or abb, delivered out to be wrought, or ſhall not give a ſatisfactory account of the ſame to his employer; or ſhall fraudulently ſteam, damp, or water the wool or yarn delivered to him to be wrought (thereby to increaſe the weight); or ſhall take off, cut, or pick out the lift, ſorrel, or other mark of any piece of cloth; he ſhall, on conviction before one juſtice where the offender ſhall reſide, by confeſſion or oath of one witneſs, be committed to the houſe of correction for one calander month. § 1.

And if any ſuch offender ſhall abſcond, or cannot be found; or ſhall ſell or otherwiſe diſpoſe of any of the ſaid tools, implements, or materials; or if any perſon ſhall fraudulently buy or receive any of the ſame; or if any perſon ſhall be charged on ſuſpicion with having embezzled and kept back, by means of fraudulently damping, ſteaming, or watering the wool and yarn delivered out to him, or with having ſold, bought, or otherwiſe received the ſame, — and oath ſhall be made thereof before one juſtice where the offence was committed; ſuch juſtice ſhall iſſue his warrant to the conſtable, to enter into and ſearch in the day time the dwelling houſe of ſuch perſon, and alſo ſuch other houſe or place, of which the clothier or his ſervant ſhall make oath that he hath juſt cauſe to ſuſpect (it appearing to the ſaid juſtice to be reaſonable ſuſpicion) that the ſaid tools or materials, or ſome part thereof, may be ſecreted: and if, upon ſearch, any of the ſaid working tools, wool, yarn, chain, woof, or abb, or any cloth, with the liſt, ſorrel, or other mark taken off, cut, or picked out, ſhall be found; the conſtable ſhall ſeize the ſame, and apprehend the perſon in whoſe cuſtody they ſhall be found, and bring him before the ſame or ſome other juſtice; and unleſs he can give a good account how he came by the ſame, to the ſatisfaction of ſuch juſtice, he ſhall be thereof convicted, and ſuffer the like puniſhment as for not returning the tools or materials as aforeſaid. And all ſuch tools and materials ſo ſeized and not accounted for, ſhall, upon ſuch conviction, be delivered over to the churchwardens or overſeers of the poor of the pariſh where the ſame were ſeized, to be by them ſold for the uſe of the poor of the ſaid pariſh. § 2.

Provided, that if the perſon accuſed ſhall requeſt of the juſtice to appoint a reaſonable time to produce the perſon of whom he bought or received the ſame, or any witneſs to prove the ſale or delivery thereof, the ſaid juſtice ſhall appoint ſuch time as aforeſaid, and ſhall iſſue a ſummons to the conſtable where ſuch perſon or wit-

§ 7. BRITISH STATUTES—OFFENCES.

neſs ſhall reſide, requiring them to appear at ſuch time and place as the juſtice ſhall appoint, in order to be examined on oath of the ſeveral matters aforeſaid; but ſuch perſon, at the time of making the ſaid requeſt, ſhall enter into recognizance for his appearance at the time ſo to be ſet; or for want of ſuch recognizance, he ſhall be committed until the ſaid time. § 3.

And upon information on oath made to any juſtice, that there is juſt cauſe to ſuſpect, that any ends of yarn, wefts, thrums, ſhort yarn, or other refuſe of cloth, drugget, or of other woollen goods, or of goods mixed with wool, (flocks and pinions only excepted), have been collected and received, and are lodged or concealed in any dwelling-houſe, warehouſe, out-houſe, yard, or other place, ſuch juſtice ſhall by his warrant cauſe every ſuch place to be ſearched in the day time; and if any of the ſaid goods or materials (flocks and pinions only excepted) above the quantity of three pounds ſhall be found therein, he ſhall cauſe the perſon in whoſe houſe or other place the ſame ſhall be found, to be brought before him or ſome other juſtice: And on proof made upon oath before ſuch juſtice, that ſuch goods or materials were found in the houſe or other place of ſuch perſon ſo brought before him; the ſaid perſon, not exculpating himſelf to the ſatisfaction of ſuch juſtice, ſhall ſuffer the like puniſhment as for not returning the tools or materials as aforeſaid. § 4.

And the conviction ſhall be in the manner and form following:

Be it remembered, that on the day of in the year of our L.
A. B. *is convicted before me one of his majeſty's juſtices of the peace and for the of of hav* [here ſpecify the offence and the ti and place when and where the fa was committed.] *Given under my ha and ſeal the day and year firſt abo mentioned.*

And the juſtice ſhall cauſe the ſa to be written on parchment, and fil at the next ſeſſions. § 8, 9.

And the juſtice, at the time of t conviction, ſhall make known to party convicted, that he hath a ri to appeal to the next ſeſſions. An ſuch perſon intends to appeal, he ſh at the time of the conviction, g notice thereof in writing to the j tice, and at the ſame time enter i recognizance with ſureties, condit ed to try the appeal, and to abide judgment of, and pay ſuch coſts ſhall be awarded by the juſtices ſuch ſeſſions. And the juſtices the upon proof of ſuch notice and rec nizance, ſhall hear and determine t matter, and may award coſts to eit party. § 7.

But if, upon information on o before a juſtice, it ſhall appear him that the perſon informed aga hath been already convicted of a offence againſt this act; ſuch ju ſhall not proceed to convict him, t ſhall commit him to the houſe of c rection till the next ſeſſions, or u he ſhall have entered into recogn ance with ſufficient ſureties to app at ſuch ſeſſions, and abide the or of the juſtices there; and the ju ſhall alſo bind over the informer t proſecute at ſuch ſeſſions. And if t perſon informed againſt ſhall be fou

said juſtices, that ſuch
been already convicted
s of any offence againſt
1 they ſhall, upon con-
mit him to the houſe of
any time not exceeding
nonths, and alſo order
ice publicly whipped at
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lways, that no perſon
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ormation upon oath be
a juſtice, within three
ths after the offence
10.
proceedings on this act
ied for want of form,
certiorari or other writ.

Anne, ſt. 2, c. 18. If
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cotton, or iron manu-
l embezzle or purloin
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r iron, or ſhall reel ſhort
and ſhall be convicted
e witneſs, or confeſſion,
uſtice, he ſhall forfeit
alue of the damages:

[illegible] employed in the working up of any woollen, linen, fuſtian, cotton, or iron manufactures, ſhall purloin, embezzle, ſecrete, ſell, pawn, exchange, or otherwiſe illegally diſpoſe of any of the materials, whether the ſame or any part thereof be or be not firſt wrought up, or ſhall reel ſhort, or falſe yarn, and ſhall be convicted thereof, as by the 1 Anne, ſt. 2, c. 18, he ſhall forfeit double value of the damages, together with ſuch coſts as the juſtice ſhall judge reaſonable; and if not paid immediately, the ſaid juſtice ſhall cauſe him to be committed to the houſe of correction, to be whipped and kept to hard labour, not exceeding 14 days; and for a ſecond or other ſubſequent offence, for ſuch embezzling or purloining, he ſhall forfeit four times the value of the damages, together with ſuch coſts as the juſtice ſhall judge reaſonable; and if not paid immediately, then ſuch or any other juſtice ſhall cauſe him to be committed to the houſe of correction, to be kept to hard labour for any time not exceeding three months, nor leſs than one month, and alſo during the time of ſuch commitment, ſhall cauſe him to be publicly whipped in the market

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tures [f]; of perſons engaged in the making of hats, or in t woollen, linen, fuſtian, cotton, iron, leather, furr, hem flax, mohair or ſilk manufactures [g]; of workmen in the m nufacture of clocks and watches [h].

acts ſhall be half to the party injured, and half to the poor; with the like liberty of appealing on this act, as on the 1 Anne. Id. § 3.

[f] If any perſon employed in cutting, paring, waſhing, dreſſing, ſewing, making up, or otherwiſe manufacturing of gloves, breeches, leather ſkins, boots, ſhoes, ſlippers, wares, or other goods or materials to be made uſe of in any the ſaid employments, or in any branch or particular thereof, ſhall fraudulently purloin, embezzle, ſecrete, ſell, pawn, or exchange all or any part of the gloves, breeches, leather, ſkins, parings, or ſhreds of gloves, or leather, boots, ſhoes, ſlippers, or other the ſaid wares, either before or after they ſhall be made into wares, and be thereof convicted by the oath of the maſter or owner, or other credible witneſs, or confeſſion, before the juſtice where the offence ſhall be committed or the offender ſhall reſide; ſuch juſtice may award him to make ſatisfaction to the party injured, not exceeding double the value of the goods ſo purloined or diſpoſed of, half to the party grieved, and half to the poor, together with full charges attending the conviction; to be levied by diſtreſs and ſale; and if he ſhall not have goods ſufficient, and ſhall not pay immediately, ſuch juſtice ſhall commit him to the houſe of correction or other public priſon, to be kept to hard labour for fourteen days, and whipped in ſuch manner as the juſtice ſhall direct; and for a ſecond, or other ſubſequent offence, ſhall forfeit four times the value, the damages, together with ſuch co as the juſtice ſhall judge reaſonable and if not paid immediately, to be co mitted to the houſe of correction other public priſon, to be there he to hard labour not exceeding th months, nor leſs than one month, a alſo during ſuch commitment to publicly whipped in the market to where he ſhall be committed, at market place or croſs, once or oftener as to ſuch juſtice ſhall ſeem reaſonable. § 4. 13 Geo. II, c. 8.

And every perſon who ſhall knowingly or willingly receive any of ſaid goods or materials, either fr the perſon offending, or from a other perſon (except the owner), offer ſo to do; he ſhall, on like co viction, make ſuch recompence two days, or elſe be ſubject to a diſtreſs, and for want of ſufficient diſtreſs be liable to the like puni ment, as the perſon ſo purloining otherwiſe diſpoſing thereof as aforeſ and ſo in like manner for the ſecon and every ſubſequent offence. § 5.

[g] If any perſon hired or employed to make any felt or hat, or to prepare or work up any woollen, linen, fuſtian, cotton, iron, leather, furr, hemp, flax, mohair, or ſilk manufactures, or any manufactures made up of wool, furr, hemp, flax, cotton, mohair, ſilk, or of any the ſaid materials mix ed one with another, ſhall purloin, embezzle, or otherwiſe unlawfully diſpoſe of any of the materials w

to the houſe of correction
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2 Geo. II, c. 27, § 1. 17
. 56, § 1, 2.

any perſon ſhall be con-
foreſaid, of buying, receiv-
ing, by way of gift, pledge,
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ence, forfeit not more than
ſuch other public charity as the juſtices ſhall appoint: And if the ſaid penalty ſhall not be paid on conviction the juſtices ſhall commit the offender to the houſe of correction or other public priſon, there to be kept to hard labour, for any time not more than ſix months nor leſs than three months, unleſs the penalty ſhall be ſooner paid; or the juſtices may ſend him to the houſe of correction or other public priſon, for three days excluſive of the day of commitment, with an order that within the ſaid time the offender ſhall be once publicly whipped at the market place or ſome other public place where the offender ſhall be committed. For a ſecond offence, if a perſon brought before the juſtices ſhall be charged therewith upon oath, they ſhall not proceed to convict him, but ſhall commit him to the houſe of correction or other public priſon, till the next general, or general quarter ſeſſions, or till he ſhall have entered into recognizance to anſwer for ſuch offence at the ſaid ſeſſions; and the juſtices there ſhall hear and determine the matter; and if the perſon ſhall be convicted, he ſhall forfeit not more than 10l. nor leſs than 5l. to be recovered and diſtributed in like manner as the penalty for the firſt of-

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ſuch materials, knowing them to have been purloined or embezzled, he ſhall ſuffer like puniſhment as for receiving the ſame. 17 Geo. III, c. 56, § 5.

And although the purloined materials be worked up, or otherwiſe diſpoſed of, ſo that it may be difficult to convict the offender; two juſtices as aforeſaid, or the juſtices in ſeſſions reſpectively, on proof upon oath that ſuch perſon hath purloined or embezzled, or received ſuch materials knowing them to be purloined or embezzled, may convict the offender, although no proof ſhall be given to whom ſuch materials belong. Id. § 6.

All which proviſions, in reſpect of materials, ſhall extend to all tools and implements for manufacturing the ſaid materials; and alſo to all drugs or ingredients wherewith any perſon ſhall be entruſted for dying, preparing, and manufacturing the ſame. Id. § 16.

If any perſon ſhall wilfully damniſy, ſpoil, or deſtroy, any work committed to his charge; he ſhall, on conviction as aforeſaid, forfeit to the owner double value, by diſtreſs; for want of ſufficient diſtreſs, the offender ſhall be committed to the houſe of correction, to be kept to hard labour, for any time not exceeding three months, or till ſatisfaction be made. 22 Geo. II, c. 27, § 12.

And two juſtices, on complaint upon oath, that there is cauſe to ſuſpect that any embezzled materials, whether mixed or unmixed, wrought or unwrought, are concealed in any dwelling houſe, out-houſe, yard, garden, or other place, may by their warrant cauſe the ſame to be ſearched in the day time; and if any ſuch materials ſhall be found, they may cauſe the ſame and the perſon whoſe poſſeſſion they were ſo to be brought before them or other two juſtices of the diſtri and if ſuch perſon ſhall not give account to the ſatisfaction of the j tices how he came by the ſame, ſhall be convicted, although no pr ſhall be given to whom the mater belong: And every peace officer, watchman during the time he is on duty, may apprehend any per who may be reaſonably ſuſpected carrying, after ſun-ſetting and be ſun-riſing, any ſuch materials, the ſame, together with ſuch per may carry before two juſtices; if he ſhall not produce the party whom he bought or received ſame, or ſome perſon to teſtify oath the ſale or delivery thereof, ſhall not give a ſatisfactory acco how he came by the ſame, he be convicted in like manner alth no proof ſhall be given to whom materials belong.—Provided, tha either of theſe caſes, if the perſon ſhall be brought before the ju ſhall requeſt them to appoint a ſonable time to produce the pe of whom he bought or received ſame, or a witneſs to prove the or delivery thereof, the juſtices appoint ſuch time, and iſſue a mons to the conſtable where perſon or witneſs ſhall reſide, re ing him to appear and give evid but ſuch perſon, at the time of h queſt, ſhall enter into recogni for his appearance at the time for want of ſuch recognizance, be committed until ſuch time pointed. 17 Geo. III, c. 56, § 10, 12.

And when a perſon ſhall be c

e newſpaper uſually circulated or otherwiſe to cauſe notice to n by ſome public cryer, and g ſuch notice on the church el door, that thoſe who have ch materials may come and he ſame; and if any perſon ve them to be his, the juſtices der them to be reſtored to ner, he paying the charges of ng, depoſiting, and giving no- But if before the end of thirty perſon ſhall prove his pro- he juſtices ſhall order the ſame ld, and after deducting ſuch as aforeſaid, together with rges of ſale, one moiety of the ariſing from ſuch ſale ſhall be o the proſecutor, and the other either to the poor where the ion ſhall be, or to ſuch public as the juſtices ſhall appoint: e offender ſhall forfeit, for the fence 20l. for the ſecond of- 0l. and for every ſubſequent 40l. All which ſaid reſpective ures ſhall be levid by diſtreſs, ſtributed, half to the informer, lf to the poor where the con- t ſhall be, or to ſuch public as the juſtices ſhall appoint: ufficient diſtreſs ſhall be found, materials, ſhall, for his own profit, and without conſent of the maſter, dye any of the ſame, whether wrought or unwrought; he ſhall, for the firſt offence, forfeit 10s. for the ſecond offence 20s. and for every ſubſequent offence 40s.: Or if any perſon ſhall procure any ſuch materials to be dyed by any ſuch journeyman, ſervant, or apprentice, without conſent of the maſter; he ſhall forfeit for the firſt offence 5s. for the ſecond offence 20s. and for every ſubſequent offence 4l.; to be recovered as aforeſaid before two juſtices, on the oath of one witneſs, to the uſe of the informer; and in caſe of non-payment on conviction, the offender to be committed to the common gaol or houſe of correction for any time not exceeding one month. Id. § 17.

By the 14 Geo. III, c. 44, if any perſon ſhall reel falſe or ſhort yarn, and ſhall be thereof convicted *by the oath of the owner of the yarn*, or of one witneſs, or by confeſſion, before one juſtice where the offence was committed, or the offender ſhall reſide; (*b*) ſhall, for the firſt offence, forfeit not exceeding 20s. nor leſs than 5s.; for the ſecond offence, not exceeding 4l. nor leſs than 40s.: and for the

§ 7. BRITISH STATUTES —OFFENCES.

whipped at the market town nearest to the place where the offence was committed, on a market day. All which forfeitures shall go to the party aggrieved. § 2.

And the conviction shall be in this form:

Be it remembered, that on the day of , in the year of our Lord , A. B. is convicted before me , one of his majesty's justices of the peace for [specifying the offence. and the time and place when and where committed, and also specifying that it is the first, second, or third offence against this act.] *Given, &c.*

[h] By the 27 Geo. II, c. 7, if any person employed by any one practising the trade of clock-making, or watch-making, or any part or branch thereof, to make, finish, alter, repair, or clean any clock, watch, or part thereof; or entrusted by any person practising the said trade or trades, with any gold, silver, or other metal or material, to be, or that shall be, in the whole or in part, wrought or manufactured for any part of a clock or watch, or any diamond, or other precious stone, to be, or that shall be, set or fixed in or about any clock or watch; shall purloin, embezzle, secrete, sell, pawn, exchange, or otherwise unlawfully dispose of any clock, watch, gold, silver, or other metal or material, or any part thereof, or any diamond or other precious stone, with which he shall be so entrusted; and shall be thereof convicted by the oath of the owner, or other credible witness, or confession, before one justice, where the offence shall be committed, or the person so charged shall reside, shall for the first offence forfeit a and if not forthwith paid, the just shall commit him to the house of co rection or other public prison, the to be kept to hard labour for t space of fourteen days, unless the fo feiture shall be sooner paid; and within two days before the expi tion of the said fourteen days, fo forfeiture shall not be paid, the just may order him to be publicly wh ped at the market place, or so other public place of the city, tow or place, where he shall be comm ted; and for a second, or other f sequent offence, he shall forfeit in like manner; and if not paid for with, the justice shall commit him aforesaid, to be kept to hard lab for any time not exceeding th months, nor less than one month, less the forfeiture shall be soo paid; and if within seven days bef the expiration of the time for wh he shall be committed, the forfeit shall not be paid, the justice may der him to be whipped in like m ner, twice or oftener, as to such j tice shall appear reasonable.

And if any person shall buy, ceive, accept, or take by way of p pawn, pledge, sale, or exchange, in any other manner, of or from person whomsoever, any clock watch, or part thereof, of any g silver, or other metal or materia aforesaid, whether the same, or part thereof, be or be not wro or manufactured, or any such mond or other precious stone, kn ing the same to be so purloine embezzled; he shall, on the like viction, for the first offence, fo 20l. and if not forthwith paid,

juſtice ſhall commit him in like manner, to be kept to hard labour for fourteen days, unleſs the forfeiture ſhall be ſooner paid, and if within two days before the expiration of the ſaid fourteen days, the ſaid forfeiture ſhall not be paid, the juſtice ſhall order him to be publicly whipped as aforeſaid, once or oftener, as to ſuch juſtice ſhall appear reaſonable; and for a ſecond or other ſubſequent offence, he ſhall forfeit 40l. and if not forthwith paid, the juſtice ſhall commit him as aforeſaid, to be kept to hard labour, for any time not exceeding three months, nor leſs than one month, unleſs the forfeiture ſhall be ſooner paid; and if within ſeven days before the expiration of the time for which he ſhall be committed, the forfeiture ſhall not be paid, the juſtice ſhall order him to be publicly whipped as aforeſaid, twice or oftener, as to him ſhall appear reaſonable.

And one juſtice on complaint to him made upon oath, of any offence againſt this act, may iſſue his warrant for apprehending and bringing before him, or before any other juſtice of the ſame place, the perſon ſo charged.

And the conviction ſhall be in this form:

Be it remembered, that on the day of in the year of his majeſty's reign, A. B. *was convicted before me* (or *us*) *of his majeſty's juſtices of the peace for the ſaid county of or for the riding* (or *diviſion*) *of the ſaid county of or for the city, liberty, or town of in the ſaid county of* (as the caſe ſhall be) *of purloining, embezzling, ſecreting, ſelling, pawning, exchanging, or unlawfully diſpoſing of, or of buying, receiving, or taking to pawn* (as the caſe ſhall happen to be) (ſpecifying the reſpective goods, materials, or effects) *the property of* C. D. *of in the county of Given, &c.*

If any perſon ſhall think himſelf aggrieved by the judgment of the juſtice, he may appeal to the next ſeſſions: in which caſe the execution of the judgment ſhall be ſuſpended, the perſon ſo convicted entering into a recognizance at the time of the conviction, with two ſureties, in double the ſum adjudged, to proſecute the appeal with effect, and to be forthcoming to abide the judgment and determination of the juſtices in ſuch ſeſſions; and the juſtices there ſhall hear and determine the ſame, and award ſuch coſts to either party, as to them ſhall appear juſt and reaſonable; and if the judgment ſhall be affirmed, the appellant ſhall immediately pay the ſum adjudged, together with ſuch coſts as ſhall by the court be awarded; or in default thereof, ſhall ſuffer the penalties as for purloining, embezzling, or receiving as aforeſaid.

The ſaid forfeitures, after ſatisfaction made thereout to the party injured, together with ſuch coſts of proſecution as the juſtice ſhall judge reaſonable, ſhall go to the uſe of the poor where the offender ſhall reſide.

And the juſtice ſhall cauſe the conviction to be fairly written upon parchment, and tranſmitted to the next ſeſſions, there to be filed and kept among the records.

And the ſame ſhall not be removed by *certiorari*.

N.B. This does not prevent it being ſo by advocation or ſuſpenſion.

§ 7. BRITISH STATUTES —REGULATIONS.

THERE are other regulations touching the different trades as concerning the ſettlement of wages, and paying the ſame in money, in the caſe of clothiers[1]; in the woollen, linen

Wages.

[1] By the 10 Anne, c. 16, every clothier, clothworker, cardmaker, or other perſon concerned in the trade of the woollen manufacture, ſhall pay his workmen in money, and not in goods, on pain of 20s. on conviction in thirty days, before one juſtice, on oath of one witneſs, half to the informer, and half to the poor: If he ſhall not pay in fourteen days after conviction, the ſame to be levied by the conſtable by warrant of ſuch juſtice, by diſtreſs; and where no ſufficient diſtreſs can be found, to be committed to the gaol or houſe of correction, to be kept to hard labour not exceeding three months. § 6, 7, 8.

Perſons aggrieved on this act may appeal to the next ſeſſions, who may allow coſts. § 9.

By the 1 Geo. ſt. 2, c. 15, every clothier, clothworker, cardmaker, or other perſon concerned in the trade of the woollen manufacture, ſhall pay his workmen in money, and not in goods; on pain of 40s. on conviction (in forty days) before one juſtice, on oath of one witneſs; to be diſpoſed, if in London, to the benefit of Chriſt's hoſpital, elſewhere to the poor where the offence ſhall be diſcovered; and if he ſhall not pay in thirty days, to be levied by the conſtable, by warrant of ſuch juſtice, by diſtreſs; and where no ſufficient diſtreſs can be found, to be committed to the common gaol or houſe of correction, to be kept to hard labour for three calendar months. § 7, 8, 12.

By the 29 Geo. II, c. 33, if any clothier, ſerge maker, woollen or worſted ſtuff-maker, worſted or woollen yarn ſtocking-maſter, or perſon concerned in making any woollen cloths, ſerges, ſtuffs, worſted or woollen yarn ſtockings, or any other perſon any way concerned for himſelf or another, in employing weavers combers of jerſey or wool, worſted combers, ſpinners, knitters, or other labourers, in the woollen manufactures, ſhall pay any perſon his wages in goods, or by way of truck, bill, or note, or in any other manner than in money; he ſhall (on proſecution in three months) forfeit 20l. to be recovered by action of debt, by any perſon who ſhall ſue for the ſame Or otherwiſe, before two juſtices, by confeſſion, or oath of one witneſs, by diſtreſs, (if not paid in fourteen days) and to be diſtributed, half to the informer, and half to the poor: And for want of ſufficient diſtreſs, to be committed to the houſe of correction for any time not exceeding three months, or until ſatisfaction ſhall be made. Perſons aggrieved by the order of the juſtices may appeal to the next ſeſſions, firſt entering into recognizance with ſufficient ſecurity before the juſtices to proſecute and abide by the order that ſhall be made on ſuch appeal, and giving eight days notice in writing to the party in whoſe favour the order was made. And the ſeſſions may award coſts and damages and by their order or warrant may levy ſuch coſts and damages by diſtreſs; and for want of ſufficient di

fuſtian, cotton, and iron manufactures [k]; in the leathern manufactures [l]; of workmen in the making of hats, or in the woollen, linen, fuſtian, cotton, iron, leather, furr, hemp, § 7. BRITISH STATUTES —REGULATIONS.

trict, may commit the party to the common gaol, for any time not exceeding three months, or until ſatisfaction ſhall be made. And the order of ſeſſions ſhall be final: and no proceedings of the juſtices out of, or in the ſeſſions, ſhall be removed by *certiorari*, or otherwiſe.

By the 30 Geo. II, c. 22, if any clothier or maker of any mixed, medley, or white broad cloth, ſhall refuſe or neglect to pay to the weaver employed by him his wages or price agreed on in money, within two days next after the work ſhall be performed and delivered to ſuch employer or ſome perſon on his behalf (the ſame being demanded of ſuch employer or perſon employed on his behalf); every ſuch clothier or perſon ſo offending ſhall forfeit 40s. to be recovered and diſpoſed of as by the ſaid act of the 29 Geo. II, c. 33.

[k] And all payments to the ſaid workmen, ſhall be in money, and not in cloth, victuals, or commodities; and all wool delivered out to be wrought up, ſhall be delivered with declaration of the true weight thereof; on pain that every offender in either of the ſaid caſes, ſhall forfeit double the value of what ſhall be due for ſuch work; and if any ſuch workman ſhall be guilty of any ſuch fraud or default, in the work by him done, he ſhall anſwer double damages. § 3.

And all wages, demands, frauds, and defaults of labourers, in the ſaid manufactures, concerning work done, ſhall be determined by two juſtices, who may ſummon and examine witneſſes on oath: Perſons aggrieved may appeal to the ſeſſions to be holden next after notice of the order of the ſaid two juſtices: and if the ſeſſions give judgment againſt the appellant, they ſhall order him to pay ſuch coſts as to them ſhall ſeem meet. § 4.

[l] And all payments to workmen employed in the ſaid manufactures, ſhall be in money, and not in goods, except by their own requeſt and conſent; and all materials delivered out to be wrought in ſuch manufactures ſhall be delivered with a declaration of the true weight, quantity, or tale, thereof; on pain of forfeiting to ſuch manufacturer double value of what ſhall be due for his work; and if ſuch labourer or manufacturer ſhall be guilty of any fraud, abuſe, neglect, or default, in the work by the undertaker to be done, he ſhall anſwer to the owner double damages. § 6.

And all wages, demands, frauds, abuſes, neglects, and defaults of labourers and manufactures in the ſaid trades, concerning any work done in ſuch manufacture, ſhall be determined by two juſtices, who may ſummon and examine witneſſes upon oath. § 7.

§ 7. BRITISH STATUTES—REGULATIONS.

and flax manufactures[m]; of workmen in the bone and thread manufactory[n]. There are alſo regulations reſpecting the length and weight of goods delivered out to workmen; and for detecting embezzlements, giving extraordinary powers to juſtices[p]; to maſters[q]. Indeed ſome of theſe ex

[m] The maſter ſhall pay his workmen in money, and not otherwiſe, and ſhall not make any deduction on account of any goods ſold or delivered previous to the agreement: and for the more eaſy recovering the ſaid wages, two juſtices upon complaint (in three months, 13 Geo. I. c. 23,) ſhall ſummon the party offending, and for non-payment ſhall iſſue their warrant to levy the ſame by diſtreſs; and for want of ſufficient diſtreſs, ſhall commit the offender to gaol for ſix months, or until he ſhall pay, or give full ſatisfaction for the ſame, to the good liking of the party grieved. And every perſon paying the ſame otherwiſe than in money, ſhall forfeit 10l. half to the informer, and half to the party grieved, by diſtreſs as aforeſaid. 22 Geo. II, c. 27, § 12.

[n] All lace merchants and dealers in lace, and all other perſons who ſhall employ any perſon or perſons in the making of bone or thread lace, or who ſhall buy any bone or thread lace of the maker thereof, ſhall pay ſuch perſons for their labour, and for all the lace bought of them, in money only, and not with goods, or by way of truck, or in any other manner, either in the whole or in part; on pain of 10l. to the party grieved; by warrant of one juſtice by diſtreſs; for want of ſufficient diſtreſs, to be committed to the common gaol or houſe of correction for ſix calendar months, unleſs ſuch penalty, and the charges attending the recovery thereof, be ſooner paid. 19 Geo. III, c. 4 § 1, 2.

And if any money ſhall be owing to any perſon employed in the making of any bone or thread lace, for his labour, or for the purchaſe of any ſuch lace; the ſame may be recovered in like manner as the aforeſaid penalty. § 3.

Perſons aggrieved may appeal to any ſeſſions to be holden within ſix months after the cauſe of complaint ſhall ariſe, giving fourteen days notice; and the ſeſſions ſhall hear and finally determine the ſame, and may give coſts to either party, and levy the ſame by diſtreſs. § 4.

[o] 13 Geo. I, c. 23; touching clothiers and their workmen.

[p] As 13 Geo. III, c. 23; touching clothiers and their workmen.

And one juſtice, on information on oath, that any perſon is, or is ſuſpected to be, guilty of any the ſaid practices aforeſaid, may iſſue his warrant to the conſtable or other peace officer, or to any churchwarden or overſeer, directing him in the day time to enter into any houſe, ſhop, warehouſe, or other ſuſpected place, to ſearch for and examine all ſuch bars and weights as ſhall be made uſe of for the purpoſes before mentioned, by any ſuch clothier or maker of woollen goods; and if ſuch per

§ 7. BRITISH STATUTES —REGULATIONS.

ſtments go very great lengths in favour of the owner. Thus the 14th of Geo. III, c. 44, authorizes any *one* juſtice to convict a perſon of falſe reeling by the oath of any *one* witneſs, even *of the owner of the yarn*, who is entitled to the penalty; " which (ſays Dr. Burn) is a ſingular inſtance of " a conviction on the oath of a perſon doubly intereſted; " namely, both as owner of the goods, and as entitled to " the whole forfeiture [r]."

ſon ſhall interrupt the officer, he ſhall forfeit 5l. § 7.

And every maker of mixed, medley, or white broad cloth, ſhall pay the weaver according to the number of yards, that the chains are laid on the warping bars, and not otherwiſe, on pain of 5l. § 9.

[q] As 17 Geo. III, c. 56, § 15; touching diſputes between maſters and their workmen in the making of hats, or in the woollen, linen, fuſtian, cotton, iron, leather, furr, hemp, flax, mohair, or ſilk manufactures; which ſtatute makes it " lawful for the " owner of the materials to enter at " all ſeaſonable hours in the day " time, into the ſhop, out-houſe, or " other place, of any perſon employ- " ed by him to work up any the ſaid " materials, and there to inſpect the " condition thereof; and if any per- " ſon ſhall refuſe to permit ſuch en- " trance or inſpection, he ſhall forfeit " any ſum at the diſcretion of the juſ- " tices not leſs than 40s.; to be levied " and applied as for having materials, " and not being able to give a ſatis- " factory account how he came by " them." Id. § 15.

[r] Tit. Servants, § 18.

And yet in England, it ſeems in general to be held that a witneſs receiving part of the reward is not credible, for " a conviction on the game acts was quaſhed, becauſe the informer was witneſs."—L. Raym. 1545. Andr. 240. And, in the ſtatute of the 2 Geo. III, c. 19, reſpecting the game, it is recited, that in proſecutions on the act of 8 Geo. I, c. 19, in the courts at Weſtminſter, where a part of the penalty is given to the poor of the pariſh, the inhabitants of ſuch pariſh had been diſallowed to give evidence; and, therefore, in that caſe, to remedy the ſame, the act gives the whole penalty to the proſecutor, in order to enable the inhabitants to give evidence. Burn, tit. Game.

CHAP. VIII.

Husband and Wife.

§ 1. CONSTITUTION OF MARRIAGE—WHO MAY MARRY.

I. THE law concerning marriage is neceſſary to be known by juſtices of peace, who not only are competent to puniſh its irregular celebration, but likewiſe occaſionally take cognizance of queſtions depending on its legal conſtitution or conſequences.

Kindred. Jewiſh law. Kindred what, a bar to marriage

IN Scotland, ſince the Reformation from Popery, the holy band of marriage "has been as lawful and frie as the law of "God has permitted the ſamin to be done[a]." The Moſaical inſtitutions, therefore, muſt be our text; under which, nearneſs of kin is no bar to marriage, excepting, *firſt*, between aſcendants and deſcendants in the direct line, *ad infinitum*; and *2dly*, even in the collateral line, either where one of the parties is *loco parentis*, as uncle, granduncle, aunt, or grandaunt, to the other[b]; or where they are more nearly related

[a] 1567, c. 15.

[b] The text (c. 18, v. 12, 13, 14) mentions only aunt and aunt-in-law; however, upon manifeſt ſenſe and reaſon our law underſtands it, by implication, to prohibit alſo the marriage, *1ſt*, of

to each other than the fourth degree, according to the computation of the civil law, and the second according to that of the canon law [2]; and equally whether the relation be by

uncle and niece, and 2*dly*, of the grand-uncle and grand-niece, and grand-nephew and grand-aunt; just as, in the direct line, we extend the prohibition, which mentioned parents and children, to all the *posteri* and *proavi*.

In England, Dr. Christian says, "it "is certainly true that a man may "marry his grand-aunt. Gibs, 413." (Black. b. i, c. 15, note 2.) But in Scotland a man was beheaded for marrying his grand-aunt, even by affinity; 13 April 1629, John Weir.

[1] A degree of propinquity is the distance there is between two persons related to each other. This depends on the number of generations which form their relation; so that a degree is counted for each generation.

In the collateral line, the manner of counting these degrees, according to the civil law is different from that of the canon law. The civil law counts each generation upward from one of the parties to their common ancestor, and downward from the same ancestor to the other party, without counting their common ancestor himself.

Thus, if there be three degrees of the one side, and two of the other, that makes relations in the fifth degree.

According to this mode of computation, there is no *first* degree of propinquity in the collateral line. Brothers who are the nearest collateral kindred, are related in the second degree; uncle and nephew in the third, and cousins in the fourth.

The canon law again, counts the generations on one side only. Thus brothers are in the first degree, and cousins in the second. In the unequal line, that is, where the one party is nearer the common ancestor than the other, it counts the generations from the person farthest removed from that common ancestor. Thus uncle and nephew, as well as cousins, are in the second degree.

The canon law computation was used in regard to marriages only; in successions, the civil law computation, always. For which the canonists give this whimsical reason, that succession goes from *one* person to *another* person; whereas marriage requires *two* persons, *ideo sacri canones duas in uno gradu constituêre personas*. (Corp. Jur. Can. Decret. II, Pars. Caus. 35, quæst. 5, c. 2, § 1.)

At what precise period the church first departed from the civil law computation is not very accurately known. The most ancient example of it is said to be a letter of Pope Gregory concerning St. Augustine of Canterbury's mission to England, written about the beginning of the seventh century. (Smith's edit. of Bede's Eccles. History, App. N° 6.)

In France, according to M. Pothier, there is evidence of its having been in use in the middle of the eighth century. (V. iv, p. 185.)

§ 1. CONSTITUTION OF MARRIAGE —WHO MAY MARRY.

full or half blood [a]; by marriage or illicit intercourſe, *quoniam in contrahendis matrimoniis naturale jus et pudor inſpiciendus eſt* [b]; and by affinity as well as conſanguinity [c].

At length, Alexander II, who mounted the papal throne in 1061, in a letter addreſſed to all the biſhops and judges of Italy, prohibited the uſe of the civil law computation in regard to marriage, under the penalty of excommunication. Corpus Juris Can. Decret. II, Pars. cauſ. 35, quæſt. 5, c. 2, § 1.

The Scottiſh ſtatute 1567, 15 follows the rule of the canon law, which "was the common way of computing degrees in Scotland at that time, and continues to this day among the vulgar." (Erſk. b. i, c. 6, § 9)

"It is ſaid that the canon law computation has been adopted in England; yet I do not know a ſingle inſtance" (Profeſſor Chriſtian remarks, Black. b. ii, p. 208) "in which we have occaſion to refer to it. But the civil law computation is of great importance in aſcertaining who are entitled to the adminiſtration, and to the diſtributive ſhares, of inteſtate perſonal property."

[a] Erſk. b. i. t. 6, § 9; Hume, v. ii, p. 290, &c.

The laws of many nations, however, on the matter of marriage, made a diſtinction between half and full blood. The Athenian laws allowed marriages between brother and ſiſter by the father's ſide; but not between brother and ſiſter uterine: whereas, in the latter caſe, the Spartan laws permitted it, but not in the former. (Potter's Antiquities, v. i, p. 159, and v. ii, p. 291.) B as to this proviſion of the Athen law, doubts have been entertain The authors, and arguments *pro a con*, are detailed by Bayle, in Dictionary, in the life of Cimon.

[b] L. 14, § 2, ff. de Rit. Nup: Bu b. i, c. 5, § 42.

Thus brother and ſiſter, both b tards, can no more intermarry th when they are both legitimate; alſo in the caſe of other prohibi degrees of conſanguinity.

[c] Erſk. b. i, t. 6, § 9.

The general rule is, that in wh ever degree of conſanguinity a p ſon is related to one of the ſpou he is related to the other in the ſa degree of affinity. This is ſuppo to be implied in verſe 14th, wh forbids connection with the unc wife, "*becauſe ſhe is thine aunt.*"

In the canon law (*jure civili quod modo*, ſays Voet, *ſed magis jure can ca*; l. xxii, f. 2, § 29.) three kind affinity are mentioned. The firſt ar from one marriage; the ſecond fr *two* marriages; the third from t marriages.

The firſt ſubſiſted betwixt on the ſpouſes and the other's *con guinii*; the ſecond, was that affi which the canoniſts imagined to ſiſt betwixt one of the ſpouſes the *affines* of the other; and the t was that which was imagined to ſiſt between one of the ſpouſes, the other's *affines* of the ſecond ki

For example—Titius, *by mar*

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It is only the ſpouſes themſelves that are connected by affinity with the *conſanguinei* of each other. The *conſanguinei* of the one ſpouſe are not connected by affinity with thoſe of the other. Hence a father and ſon may marry a mother and daughter; or two brothers two ſiſters; or a man the widow of his brother-in-law; or a woman the widower of the ſiſter of her brother's wife.

ſoceruis, becomes ſtepfather to her children; ſon-in-law to her parents; brother-in-law to her brothers. But if the ſtep-ſon, or father-in-law, &c. marry, Titius was ſuppoſed to be related to their wives by affinity, *ſecundi generis*, which aroſe from *two* marriages, viz. Titius's own marriage, and that of his ſtep-ſon or father-in-law.

In like manner, if, on the death of his ſtep-ſon, &c. the widow ſhould marry, there then took place between Titius and ſuch huſband affinity of the *third* kind, which aroſe from *three* marriages: viz. 1ſt, his own; 2dly, his ſtep-ſon's; 3dly, that of his ſtep-ſon's widow.

Theſe three different claſſes of affinity were long conſidered by the canon law equally with conſanguinity a bar to marriage. But the ſecond and third kind were afterwards abolished by the Lateran Council; (apud Mabil. Muſæum Ital. tom. ii, p. 576.)

Even in popiſh countries, therefore, as well as with ourſelves, the only ſpecies recognized is, affinity of the firſt kind.

Whether affinity ariſes from an illicit intercourſe, has given riſe to much diſcuſſion and numerous diſtinctions among lawyers. The civil law does not afford any expreſs text condemning the marriages of perſons connected only by baſtard affinity. Children were indeed expreſsly forbid from marrying their fathers' concubines. But in thoſe days concubinage was recognized by the law. At the ſame time, the marriage of a woman with the father or ſon of the ſame perſon with whom before ſhe had been criminally connected, would be too repugnant to the feelings of nature, to be permitted in any civilized country, and far leſs among a nation ſo religiouſly obſervant of propriety with regard to matrimonial connections as the Romans. But the canon law carried the matter to the contrary extreme, putting baſtard and legitimate affinity on the ſame footing. This, however, was corrected. Amidſt other improvements, the Council of Trent, in the caſe of baſtard affinity, limited the prohibition to the ſecond degree, that is, couſin-germans; while, in the caſe of lawful affinity, it extended to the fourth.

In puniſhing for inceſt, our courts of juſtice, even after the Reformation, adopted the ſevere view of the canon law. Which ſevere conſtruction, however, did not govern two of the lateſt caſes. See the whole deciſions on this ſubject ſtated by Mr. Hume, who entertains doubts where there be any juſt principle for ſuppoſing any ſuch relationſhip to reſult from *vagæ nuptiæ*.

§ 1. MARRIAGE VALID—BETWEEN WHOM.

THE lawfulneſs of one marrying his ſiſter-in-law has ſometimes been the ſubject of doubt and controverſy. The Moſaical law contains no ſuch expreſs prohibition; but it ſeems to imply it [d]. And to uſe the words of Paulus, on another occaſion, *in re dubia certius et modeſtius eſt hujuſmodi nuptiis abſtinere* [e]. Our practice, accordingly, holds ſuch marriages unlawful. The intercourſe of perſons ſtanding in that degree of relation to each other, has been puniſhed as inceſt [f].

Spiritual affinity.

DURING the Popiſh ſuperſtition, another obſtacle to lawful marriage, aroſe from what was termed ſpiritual affinity, viz. *1mo*, that ſubſiſting betwixt the perſon baptized, on the one hand, and the perſon who baptized him, and alſo, his godfather and god-mother on the other; *2do*, between the perſon who adminiſtered baptiſm, and the god-father and the god-mother on the one hand, and the natural parent of the perſon baptized on the other; *3tio*, between the perſon baptized and the children of the god-father and god-mother; *4to*, between the god-father and god-mother. The two laſt were aboliſhed by the Council of Trent.

MARRIAGE cannot be entered into by perſons already married, for this would be the crime of bigamy; nor by impotent perſons; nor, in general, by thoſe who cannot conſent, as lunatics, unleſs during a lucid interval; ideots, and perſons under age, though, in the latter caſe, ſhould they ad-

[d] The marriage between a woman and her huſband's brother is expreſsly prohibited. (ver. 16th.) But the huſband's relation to his wife's ſiſter is identically the ſame with that of the wife to her huſband's brother. The prohibition in this caſe, therefore, ſtands on the ſame footing with that of uncle and niece; which in like manner is forbidden by implication only. In one caſe, indeed, a man was expreſsly ordained to marry his brother's widow. (Deut. c. xxv, v. 5.) But that was a ſpecial exception for a particular purpoſe, and rather confirms the general rule. In that caſe the firſt born was conſidered the child of the defunct, and inherited his fortune.

[e] Ff. l. 14, § 3; De Rit. Nupt.

[f] Hume, v. ii, c. 18.

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here, on arriving at puberty, a second celebration is not requisite. If one of the parties should be under pupillarity, and the other of age, even the latter also may resile; for both must be bound or neither.

§ 2. MARRIAGE —ITS CONSTITUTION.

II. "THE present consent, whereby they accept each "other for husband and wife [g]," constitutes a marriage: Yet "the public solemnity is a matter of order, justly "introduced by positive law, for the certainty of so import-"ant a contract [h]." But it is "not essential to marriage. "Hence arises only the distinction of public or solemn, "and private or clandestine marriages [i]." Both are equally valid. But the former alone are approved of; the latter are discountenanced and punished; though "they cannot be de-"clared void and annulled [k]." Just as the ancient church professed to *detest* such marriages, while, nevertheless, it held it an article of faith to believe that they truly constituted the *sacrament of marriage* [l].

Consent constitutes marriage.

Public solemnity, matter of order only; not essential.

Clandestine marriage valid.

HOWEVER, our law, notwithstanding its inclination in favour of marriage, punishes clandestine and irregular marriages by pains and penalties; but careful not to confound what is accidental merely with what constitutes a marriage in *foro Dei*, it holds such marriages, to every effect, as valid as the most regular. And so, too, stood anciently the law throughout all Christendom; till positive enactments,—in some countries sooner and in others later, in some more and

Scots law still retains the ancient principles.

[g] Stair, b. i, t. 4, § 6.
[h] Ibid.
[i] Ibid.
[k] Ibid.
[l] Les mariages clandestins, c'est à dire, ceux qui ne sont pas contractés en face d'Eglise, mais secrétement, *per sponsalia de præsenti*, continuerent, toujours depuis à être regardés comme valables, ils étoient encore regardés comme tels au temps du Concile de Trente; et ce Concile va même jusqu' *à frapper d'anathême ceux qui* nieroient que ces mariages fussent de vrais mariages, tant que l'Eglise n'a pas encore jugé à propos de les déclarer nuls, quoiq'elle *les ait toujours détestés*. Pothier, t. 3, p. 290.

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in others leſs,—changed and corrupted the principle; which, however, with us, happily, remains entire ſtill. Marriage then, with us may be conſtituted validly—

—CONSENT DE PRESENTI.

1*ſt*, By "any contract made *per verba de preſenti*, or in "words of the preſent tenſe. The matrimonial union may "be accompliſhed, not only without any aſſiſtance of re- "gion or the church, but even without the uſe of any ap- "pointed civil form; ſo the couple themſelves, though "unauthorized by the will of parents or guardians, do ex- "plicitly, fully, and deliberately conſent [a]." This conſent of parties, therefore, "may be expreſſed before a civil ma- "giſtrate, or even before witneſſes; or declared in writing, "provided the writing is ſo conceived as neceſſarily to im- "port their preſent conſent [b]." But ſuch private conſent muſt have been freely emitted and ſeriouſly intended by both parties to conſtitute a marriage. From a defect in this par- ticular, it has been found that a marriage was neither con- ſtituted by a written acknowledgment [c]; nor by a ſeries of

The conſent muſt be free, &c.

[a] Hume, Criminal law, v. ii, c. 20.

[b] Erſk. b. i, t. 6, § 5.

[c] 25 June 1782, M'Innes againſt More. In this caſe, the commiſſaries and the court of ſeſſion found the marriage proven. But it appeared that the man, at the woman's deſire, had copied over and ſigned the acknowledgment, not for the purpoſe of making a marriage, but for a different purpoſe underſtood between them. It was on this ground that the interlocutors were reverſed, as appears from the judgment of the houſe of peers. "It is declared, that the "written acknowledgment is not ſufficient proof of any marriage or "matrimonial contract having paſſed "between the purſuer and defender; "and it is therefore ordered and ad- "judged, that the interlocutors com- "plained of be reverſed; and that "the court of ſeſſion do remit the "cauſe to the commiſſaries, with di- "rections to find, that the ſaid writ- "ten acknowledgment is not ſuffi- "cient proof of any marriage or ma- "trimonial contract having paſſed "between the purſuer and defender; "and to proceed accordingly."

So, too, in the caſe, Taylor *ag.* Kelly, Feb. 16, 1786. There were mutual declarations in writing, which the commiſſaries found ſufficient to conſtitute a marriage. But the court were much divided; and, from the Faculty report, it appears that not one of the judges expreſſed any doubt that, by the law

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letters from the parties, addreſſed to each other as huſband and wife, together with a verbal acknowledgment before witneſſes[d]; nor, in more than one caſe, even by the regular performance of the ceremony by a clergyman[e]; nor by mar-

ſtrument, conſent made a marriage. But, from the circumſtances of the caſe, the minority conſidered the writing, as meant by the defender, to ſignify no more than "her willingneſs merely to enter into a regular marriage with the purſuer;" and that neither of the parties underſtood themſelves to be married perſons. In this view, it appears to have been that the houſe of peers reverſed the interlocutor. Their judgment was as follows: "It is declared, that the two letters inſiſted on in this proceſs, ſigned by the parties reſpectively and mutually exchanged, were *not intended by either, or underſtood by the other, as a final agreement*, nor was it ſo underſtood or intended that they had thereby contracted the ſtate of matrimony or the relation of huſband and wife, from the date thereof; on the contrary, it was expreſsly agreed that the ſame ſhould be delivered up; if the purpoſe they were calculated to ſerve, proving unattainable, ſuch delivery be demanded; which laſt mentioned agreement is farther proved by the whole ſubſequent conduct of parties: therefore, ordered and adjudged that the interlocutors complained of be reverſed, and that the court of ſeſſion do remit to the commiſſaries to aſſoilzie from the declarator of marriage."

[d] Dec. 6, 1796; M'Lachlan. In this caſe, at firſt, the marriage was found to be proven; which interlocutor was afterwards altered, under the very particular circumſtances of that caſe, the court did not think there was ſufficient evidence of a real *de preſenti* matrimonial conſent. It was generally admitted that had there been conſummation, it would have been deciſive in favour of a marriage. In ſo nice a caſe, that circumſtance would have turned the balance.

[e] June 29, 1756; Cameron againſt miſs Malcolm. "A perſon having "planned an advantageous match for "his ſon with an heireſs juſt turned "of twelve years of age, brought the "parties together at ſupper in a re"lation's houſe, where the young "lady's mother was likewiſe pre"ſent. A clergyman was introduced, "the match propoſed, and upon the "mother's leaving the room, the "ceremony was performed, and the "parties ſubſcribed marriage-lines. "On the mother's return to the "room, a bedding was propoſed, to "which the mother objected; and a "diſpute taking place, ſhe carried "her daughter home with her. In "a declarator of marriage, the com"miſſaries found the marriage pro"ven; but the lords, taking into "conſideration the whole circum"ſtances of the caſe, altered that "judgment."--Dict. vol. iv, tit. Proof, p. 171.

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riage contracts, though the parties therein profeſs, *de* to take each other reſpectively for huſband and wife real meaning appearing ſufficiently from their likewi ing themſelves to celebrate a marriage.

—PROMISE CUM COPULA.

2*dly*, MARRIAGE may be validly conſtituted, " in " cohabitation *per verba de futuro* alſo [f]." Or, in th of lord Stair, " by natural commixtion, where th " been a promiſe or eſpouſals preceding, for therei " ſumed a conjugal conſent *de preſenti* [g]."

In the caſe of Allan, ſchoolmaſter in Edinburgh, againſt Anne Young, in 1773, a ſimilar deciſion was given. The marriage ceremony had been regularly performed by a clergyman, and the girl turned twelve years of age; but ſhe was under Allan's care as a teacher; and it appeared from the proof, that undue influence, and a train of fraud and impoſition had been uſed in order to obtain her conſent. In theſe caſes no conſummation had taken place.

[f] Black. b. i, c. 15, in ſpeaking of the law of England, which, before the marriage act, was nearly the ſame with our own.

[g] B. i, t. 4, § 6; and Erſk. b. i, t. 6, § 4. Lord Gardenſton's MS. tit. Marriage; where his lordſhip adopts the above paſſages from lord Stair, as to conſent *de preſenti* and promiſe *cum copula*, conſtituting a marriage.

A very ſtrong inſtance occurred of the effect given to marriages of this laſt deſcription, 15 Dec. 1752, Aliſon Pennycook againſt John Grinton, and Anne Graite. Aliſon bore a child to John Grinton, and concluding for aliment to the child, and 100l. ſterling of damages merely, ſh a proceſs before the con which, however, was di till 1751. In the interval openly married Anne G without proclamation of ba cohabited as man and wi child was born. Thereaf brought a new proceſs, li the promiſe and copula, an ing, 1mo, that ſhe and Grin be declared married perſc their child lawful; 3dly, th entitled to obtain a divorce of his connection with Ann who, on the other hand, declarator of her marriage, ed that ſhe, and not Aliſo lawful wife; ſhe argued th miſe and copula did not co marriage, but *rebus integri* the party in an action, oblige the other to comple riage. The commiſſaries de ſon Pennycook and John lawful huſband and wife, child a lawful child. Th ſeſſion affirmed the judgme of ſimilar hardſhip occurre land. " A contract *per verba* " *tempore* uſed to be conſid

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3*dly*, "MARRIAGE is presumed or inferred from cohabitation, or parties living together at bed and board, joined "to the parties being *habite*, or held and reputed man and "wife [h]." If the cohabitation take place abroad, no more effect will be given to it here than it would have had in the country where it happened.

EVEN in England, indeed, long cohabitation and repute presume a marriage. In like manner, in France, before the Revolution, marriages, celebrated by any other person than the *propre curè*, or by orders from him, were null. Yet such questions were not listened to after any considerable interval [i].

LORD KAMES, in his tract on the form of completing marriage by the law of Scotland [a], says, "in Scotland this pro-"clamation" (bans) "is useful for the greater solemnity, "and to give opportunity for objecting to the marriage; "but *the priest's blessing appears to be the only solemnity that is* "*indispensible*."

LORD KAMES thus admits that no *civil* form is essential to the validity of marriage; but he considers the priest's blessing indispensible.

"ecclesiastical courts *ipsum matrimo-*
"*nium*; and if either party had after-
"wards married, this, as a second
"marriage, would have been annull-
"ed in the spiritual courts, and the
"first contract enforced. See an in-
"stance of it 4to, 29. But, as this
"pre-engagement can no longer be
"carried into effect as a marriage, I
"think we may now be assured that
"it will never more be an impedi-
"ment to a subsequent marriage ac-
"tually solemnised and consummat-
"ed."—Christian's Black. b. i, c. 15, Note 3. See Cochran against Campbell, App. III.

[h] Ersk. b. i, t. 6, § 8.

[i] The answer was, "L'appellant "etoit indigne d'être écouté et reçu "à entrer dans la discussion qu'il "alléguoit; et qu'on devoit présumer "que les choses s'étoient passes dans "les regles."—Pothier, de Droit, t. iii, p. 297.

[a] Illucid. art. 5.

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THE opinion of ſo learned and ingenious an author, i point of ſuch intereſt, is entitled to particular attention. I no diſreſpect to lord Kames to examine his doctrine. He precated nothing ſo much as "exceſs in deference to the a "thority of men of eminence [b]." He profeſſed it to be "intention only to give examples of reaſoning free from t "ſhackles of authority;" "wiſhing, hoping, to rouſe t "ſpirit in others [c]." That philoſophical lawyer placed fame on another baſis than the number of implicit followe or the practical juſtneſs of all his opinions: He truly p dicted that our bar would "be indebted to" him "e for" his "errors [d]."

LORD KAMES obſerves, that "marriage required no "lemnity before the time of Pope Innocent III. The bri "groom went to the houſe where the bride lived, and "her home to his own houſe; by which ſimple form t "became man and wife. But a ceremony ſo ſlight, giv "riſe to many queſtions about marriage, both with reg "to the parties and their iſſue, marriage in the church "fore the prieſt, was eſtabliſhed as an *eſſential* ſolemnit

Antiquity of the nuptial bleſſing.

THE celebration of marriage, *in facie eccleſiæ*, and the prie bleſſing, were of much greater antiquity than the times Innocent the third. Tertullian, in the ſecond and th century [e], St. Ambroſe, in the fourth [f], and in the fifth c

b Preface to Elucidation, p. x.

c Ibid.

d Ibid.

e "Unde ſufficiemus," ſays he, "ad "enarrandam felicitatem ejus matri- "monii quod eccleſia conciliat, con- "firmat oblatio, *obſignat benedictio*." —Lib. ii, ad Uxor, c. 8.

f Thus, in one of his letters to St. Virgil of Saliſbury (his 19th let ſpeaking of the unlawfulneſs of Ch tians marrying infidels, that father preſſes himſelf as follows: "Q "ipſum conjugium *velamine ſan* "*tali et benedictione* ſanctificari o "teat quomodo poteſt conjugi "dici ubi non eſt fidei concordia

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any Pope Innocent the firſt [g], all ſpeak of the prieſt's bleſſing, as uſually taking place in the caſe of chriſtian marriages.

Its import not neceſſary to the validity.

BUT it was merely a pious uſage, by no means neceſſary to the marriage, which was validly contracted by the conſent of the parties, teſtified by their relations to whom they had declared it, *etſi Pompa aliaque nuptiarum celebritas omittatur* [h].

LORD KAMES farther obſerves, "that, among the proteſt-"ants, marriage is not held to be a ſacrament; from which "it has been raſhly inferred that there is no neceſſity for a "miniſter. But this is an erroneous opinion [i]."

The ſacrament of marriage required no prieſt.

NEITHER is this expreſſed with his lordſhip's uſual accuracy. For even where marriage was conſidered as a ſacrament, ſtill the preſence of a miniſter, though cuſtomary and approved of, was not deemed eſſential to its validity, either civilly as a contract, or ſpiritually as a ſacrament. This appears from a very unexceptionable witneſs. Pope Nicholas I. being conſulted upon this very point by ſome Grecians, diſtinguiſhes what was uſual and proper from what was eſſential. The uſual ſolemnities he deſcribes, adding *ſicque demum benedictionem et velamen coeleſte ſuſcipiunt*. But he remarks that thoſe ſolemnities were not eſſential, concluding as follows: "*ac per hoc ſufficiat, ſecundum leges, "ſolus eorum conſenſus de quorum conjunctionibus agitur* [a]."

[g] His holineſs ſpeaks of the "*be-*"*nedictio quæ per ſacerdotem nubentibus* "*imponitur.*" Epiſt. II, § 6, apud Labbei Concilia, t. ii, p. 1251.

[h] Cod. de Nuptiis, l. xxii.

Or, as it is expreſſed by Juſtinian in Novelle 74th, c. 4,—"Antiquis "promulgatum eſt legibus, et anobis "ipſis ſunt hæc eadem conſtituta, ut "etiam nuptiæ extra dotalia inſtru-"menta, ex ſolo affectu valeant et "ratæ ſunt."

[i] Ibid. p. 34.

[a] Reſponſa ad conſulta Bulgar, § 3, apud Labbei Concil. t. viii, p. 518.

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Now, it is material to take notice, that it was touchin
ſacrament of marriage that the pope had been conſu
which, therefore, he muſt have been ſpeaking of, wh
ſaid conſent alone conſtituted it [k].

SUCH continued to be the caſe till the time of the c
cil of Trent [l]; which firſt determined the nullity of
deſtine marriages.

Council of Trent.

BUT the Council of Trent did not pretend to pronc
a declaratory act, founded upon any idea, ſuch as th
lord Kames, of there being any *a priore neceſſity* in the n
of the thing that rendered celebration in *facie eccleſiæ*, o
prieſt's bleſſing, eſſential to the validity of marriage.
parties aſſumed the reverſe; and concurred in putting
regulation upon the footing of the poſitive authority o
church alone. Nay, thoſe who, on any other ground
this declaration of their nullity by the church, pretend

Heretical to call clandeſtine marriages null.

deny the validity of clandeſtine marriages, or marr
contracted by conſent alone, without any ſolemnity,
declared by the council to be guilty of a damnable her

[k] M. Pothier, taking notice of this very paſſage, ſays—"Que c'eſt du "mariage conſidéré comme ſacre- "ment, que le pape entend parler: "c'etoit ſur ce qui *étoit neceſſaire pour* "*le mariage comme ſacrement, que les* "*bulgares l'avoient conſulté.*"—Pothier de Droit, &c. t. iii, p. 287.

[l] The frequency of clandeſtine marriages was one of the evils which that council attempted to remedy. Among various remedies propoſed, one was to declare ſuch marriages *null*. As the Engliſh houſe of commons has ſeldom been adorned with more animated eloquence than on occaſion of the ſtrenuous oppoſition to their marria
ſo this celebrated council was
ſo much divided on any other
as this. Againſt the motion f
claring ſuch marriages null,
were no fewer than 56 prelate
anſwered by *non placet*. And
ſtrongly urged that it was not
on account of the want of ſolem
to declare that marriage i
which at the time had been, *f*
validly conſtituted by the *de*
conſent of the parties.

[m] Tametſi dubitandum non eſt
deſtina matrimonia libero cont
tium conſenſu facta, rata eſſe e

§ 2. CONSTITUTION OF MARRIAGE

Therefore, even in the very act of declaring clandeſtine marriages null, this council, as to the general point, is an authority againſt the opinion of lord Kames.

Clergy have no power as to the validity or invalidity of marriages.

IN annulling clandeſtine marriages, M. Pothier remarks, that the council exceeded the province of clerical juriſdiction; for it belongs to the ſecular power alone to determine as to the validity or invalidity of marriages.

Council of Trent altered the law where it was received.

THE Council of Trent was received in many parts of Europe; where therefore, of courſe, the prieſt's bleſſing became, thenceforward, eſſential to the validity of marriage; while, in thoſe countries, again, which did not embrace it, the law ſtill continued as formerly.

In France edicts paſſed.

IN France, however, where the Council of Trent was not received, king Henry the third judged it proper to make a ſpecial enactment annulling clandeſtine marriages [n]; which regulation was confirmed and farther followed out in the ſubſequent reigns. In France, then, clandeſtine marriages came to be null, and the prieſt's bleſſing neceſſary, *vi ſtatuti.*

In England alſo, ſolemnities neceſſary *vi ſtatuti.*

IN England, in like manner, ſimilar ſtatutes have been paſſed; and in particular the 26th of Geo. II, c. 33, commonly called the marriage act, which Sir William Blackſtone terms an innovation on the ancient laws and conſtitution [o].

IN Ireland, "the marriage act, 26 Geo. II, never was

matrimonia quamdiu Eccleſia ea irrita non fecit, et proinde jure *damnandi ſunt illi, ut eos ſynodus anathemate damnat qui ea vera ac rata eſſe negant.*

It paſſed the 24th ſeſſion of the council. See father Paul's hiſtory of it; and Pothier, vol. ii, p. 291.

[n] It is the 40th article of his ordinances to the eſtates of Blois. "Avons ordonné que nos ſujets ne pourront valablement contracter mariage ſans proclamations précédentes;—apres leſquels bans, ſeront épouſés publiquement; et pour témoigner de la forme, y aſſiſteront quatre témoins dignes de foi, dont ſera fait regiſtre, &c."—Pothier, de Droit Civil, &c. l. iii, p. 292.

[o] B. i, c. 15, p. 437.

§ 2. CONSTITUTION OF MARRIAGE.

" enacted; but certain acts have paſſed, particularly 9 G
" II, c. 2, and 23 Geo. II, c. 10, to invalidate by ſuit
" the eccleſiaſtical court (to be commenced within a ye
" the marriages of perſons having eſtates to a certain amou
" therein ſpecified, who marry under twenty-one, with
" conſent of parents or guardians [o]."

[o] Brown's Civil Law, Lect. 1, p. 13.

After taking notice of the great controverſy concerning the expediency of the marriage act, the learned profeſſor ſays, " The act is not " ſuppoſed to extend to Scotland; " but lord Mansfield expreſſed great " doubts upon that point.

But § 18 expreſsly provides, " that " nothing in this act contained ſhall " extend to that part of Great Britain " called Scotland." Lord Mansfield, therefore, could not have entertained or expreſſed any ſuch doubt. Probably the learned profeſſor alluded to an *obiter dictum* of lord Mansfield's, when delivering his opinion in a queſtion with reſpect to money won at play in France. His lordſhip ſaid, " I admit " that there are many caſes where the " law of the place of the tranſaction " ſhall be the rule; and the law of " England is as liberal in this reſpect " as other laws are. It has been laid " down at the bar, that a marriage in " a foreign country muſt be governed " by the law of that country where " the marriage was had, which in " general is true. But the marriages " in Scotland, of perſons going from " hence for that purpoſe, were in- " ſtanced by way of example. They " may come under a very different " conſideration, according to the opi- " nion of Huberus, p. 33, and other " writers. No ſuch caſe hath yet been " litigated in England, except one of " a marriage at Oſtend, which ca " before lord Hardwicke, who ord " ed it to be tried in the eccleſiaſt " court. But the young man cam " age, and the parties were marr " over again; and ſo the matter " never brought to trial."—Burro Reports, 1079.

Lord Mansfield doubted, theref not whether the Engliſh marriage extended to Scotland; but wheth couple reſident in England, and p poſely going to ſome other coun (no matter which), to get marr were not to be conſidered as *facie fraudem legi*, which is agreeable to opinion of many continental wri on the law of nations.

This diſtinction obtained in Fra " Tout ce que nous avons dit juſq " préſent ſur la nullité du mari " célébré hors de la préſence et ſ " le conſentement du curé des parti " a lieu, quand même le mariage " roit été célébré en pays étran " par des François, lorſqu'il pa " *que c'eſt en fraude de la loi qu'ils y* " *allés.*—Il en ſeroit autrement d " mariage qu'un Francois qui ſe tr " veroit avoir, ſans fraude, ſa r " dence dans un pays étranger, o " n'y à pas d'exercice de la reli " catholique, auroit contracté " une femme catholique, et qui au " été célebré dans la chapelle d " ambaſſadeur catholique par l'au " nier."—Pothier, t. iii, p. 297.

§ 2. CONSTITUTION OF MARRIAGE.

In thoſe countries, poſitive enactments have altered the law which was there formerly the ſame as it ſtill is with us[p]. "The intervention of a prieſt," judge Blackſtone obſerves, "to ſolemnize this contract, is merely *juris poſitivi*, and not "*juris naturalis aut divini*."

The marriage law of thoſe countries formerly the ſame with ourſelves, but altered by ſpecial enactments.

In Scotland, no ſuch ſtatutes have ever paſſed; nor do the acts againſt clandeſtine marriage interfere with its validity. And on the common law of this country, the Council of Trent could not have any virtual operation which it had not in popiſh countries. Neither can it be imagined that previouſly thereto the common, civil, or eccleſiaſtical, law of Scotland was in this particular different, or ſtricter and more ſcrupulous than in the reſt of Chriſtendom.

§ 3. REGULAR —BANNS.

III. A REGULAR marriage requires two ſolemnities. The one is, that its celebration be preceded with banns, or proclaimed[a]. Banns are a public intimation of the intended marriage, and notification to thoſe who know any objections

Yet this principle, how juſt ſoever in theory, the Engliſh courts do not appear to have deemed it fit to apply to the conſtruction of a ſtatute ſo unpopular, and of ſuch dubious policy, as their marriage act. Such marriages are not winked at merely; the court of king's bench have decided in favour of their validity. "The appellant "and reſpondent, both Engliſh ſubjects, and the appellant being under "age, ran away without the conſent "of her gaurdian, and were married "in Scotland; and, on a ſuit brought "in the ſpiritual court to annul the "marriage, it was holden that the "marriage was good."—Compton & Bearcroft, 1ſt Dec. 1768. Butler's *Niſi prius*, p. 113.

[p] Blackſtone ſays expreſsly, "that "any contract made, *per verba de pre-*"*ſenti*, or in words of the preſent tenſe, "and in caſe of cohabitation *per verba* "*de futuri* alſo, between perſons able "to contract, was, before the late act, "deemed a valid marriage to many "purpoſes."—Black. b i, c. 15. So chief-juſtice Holt, in ſpeaking of a marriage, *per verba de preſenti*, ſays, "this is a marriage, and they cannot "puniſh for fornication; but only for "not ſolemniſing the marriage ac"cording to the forms preſcribed by "law, but not ſo as to declare the "marriage void."—Burn's Eccl. law, vol. ii, p. 30.

[a] Banns, from *ban* Teutonic, a proclamation or publication.

§ 3. REGULAR —BANNS.

thereto, to divulge them. Banns were introduced by t Lateran Council in 1216, under the pontificate of In cent III. This ordinance of the Lateran Council w renewed, and more particularly regulated by the Council Trent.

THE ſame ordinance was adopted by our provincial cou cils, held at Perth in 1242 and 1269. Though of popiſh o ginal, it was retained by the preſbyterian church [b]. Th holidays being aboliſhed, the proclamation was required be made on three ſeveral Sundays. The preſbyteries at fi were in the practice of diſpenſing with banns; but have n exerciſed ſuch a power ſince the Revolution [c].

Diſpenſing with them.

THE proclamation muſt be made in the pariſh churches the parties. If the ceremony is to be performed by an ep copal clergyman, the proclamation muſt be made in the ep copal congregation alſo. Of courſe, if the parties belong any other diſſenting congregation, the proclamation ſhou take place there as well as in the pariſh church. "A cer "ficate of the clerk of the kirk-ſeſſion, that the banns we "duly publiſhed, is received as legal evidence that they we "proclaimed on three different Sundays; not to be trave "ed by poſitive proof that all the three proclamations wi "made on the ſame day [d]." As a part "of the lauda "order and conſtitution of this kirk," banns are mention

Where is the proclamation, if the parties are diſſenters.

Legal evidence of the bans.

[b] "In a reformed kirk," ſays the firſt book of Diſcipline, "marriages "ought not to be ſecretly uſed, but "in open face and public audience of "the kirk; and, for avoiding of dan- "gers, expedient it is, that the banns "be publicly proclaimed three Sun- "days, unleſs the perſons be ſo known "that no ſuſpicion of danger can ariſe, "and then may the time be ſhortened "at the diſcretion of the minis "But no ways can we admit marri "to be uſed ſecretly, how honour "ſoever the perſons be. The Sun "before the noon, we think moſt "pedient for marriage, and it be "no day elſe without the conſen "the whole miniſtry."

[c] Erſk. b. i, t. 6, § 10.

[d] Ibid.

ct 1661, c. 34; as they alſo are in the ſtatute 10 Anne, § 34. REGULAR —BANNS.
The General Aſſembly have made ſeveral acts for the
obſervation of this ſolemnity. In particular, by a re-
in 1784, it was provided, "that until perſons have Statutes taking notice of banns.
d for the ſpace of ſix weeks complete within a par-
ey are not to be conſidered as reſidenters, nor entit-
proclamation in the church thereof, but muſt be Acts of the General Aſſembly.
imed in the church of the pariſh where their ordi-
eſidence was previous to their propoſed marriage.
hat no precentor or ſeſſion clerk ſhall grant a certi-
of proclamation in behalf of any parties, unleſs he
teſt, upon proper evidence, for which he ſhall be
able, that they have reſided for the ſpace of ſix
within the pariſh, that they are unmarried perſons,
ot within the forbidden degrees of conſanguinity [d]."

ther requiſite is, that the marriage be celebrated by —CELEBRATOR.
duly authorized by law; that is, either a clergyman Who can legally perform the ceremony.
tabliſhed church, or an epiſcopal clergyman, quali-
he manner required by ſpecial act of parliament. View of the ſtatutes.
appear from a ſhort view of the ſtatutes.

olution of 1784 is in theſe
The general aſſembly do
at no ſeſſion clerk in this
oclaim any perſons in or-
rriage, until he give inti-
the miniſter of the pariſh
ng, dated and ſubſcribed
f the names, deſignations,
s of reſidence, of the par-
e proclaimed, and obtain
miniſter's leave to make
proclamation; with certi-
that, if any certificate of
ation of banns is given,
obſerving the above order,
" the ſaid certificate ſhall be held as a
" falſe certificate, and the ſeſſion clerk
" who ſubſcribes it ſhall be cenſured
" accordingly; and, in caſe of a va-
" cancy, the above intimation is to be
" made to two of the elders of the
" pariſh. And that this reſolution be
" printed in the acts of the aſſembly;
" and appointed the clerks to tranſmit
" copies of this their reſolution to the
" ſeveral preſbyteries, to be by them
" tranſmitted to the ſeſſions of the
" pariſhes within their bounds, in or-
" der to its being obſerved."

§ 3. REGULAR MARRIAGE —CELEBRATOR.

THE act 1661, c. 34 [e], directs that those who *marry*, procure themselves married, in a clandestine and inorderly way, or by jesuits priests, or any other *not authorized by the kirk*, shall be imprisoned, &c.

1661, c. 34.

Concerning church government.

BY 1661, c. 16 [f], the present administration of the church by sessions, presbyteries, and synods, was allowed in the mean time. Episcopacy was restored only by 1662, c. 1 [g]. The act 1661, c. 34, by ministers *authorized by this kirk* meant *presbyterians*, and it struck against episcopals, though Roman catholics seem chiefly to have been in view.

Episcopacy restored by 1662, c. 1.

ACCORDINGLY, in the act 1690, c. 27 [h], rescinding the acts against nonconformity to the episcopal church, the act 1661 c. 34, is not mentioned, though the act 1670, c. 6 [i], (passed in the time of episcopacy) is.

1690, c. 27, rescissory act.

THE act 1695, c. 12 [k], upon the narrative that baptising and solemnising of marriages, by the laws and custom of this kingdom, and by the constitution of this church, have always been done by ministers of the gospel, authorized by law and the *established church of this nation*; therefore prohibits all *outed ministers* to baptise or solemnise marriage, &c.

1695, c. 12.

BY *outed ministers* here are meant the episcopal clergy, who were turned out of their churches at the Revolution.

Right of celebration confined to the establishment.

THE exclusive right to marry, therefore, remained still with the presbyterian church, the established church, both in 1661 and 1695; and it deserves notice, that in the close of this same act 1695, c. 12, the former acts against *private and clandestine marriages* are declared to stand in full force.

[e] Parl. i, Cha. II.
[f] Ibid.
[g] Ibid.
[h] Parl. i, Will. & Mary.
[i] Parl. ii, sess. 2, c. 2.
[k] Parl. i, Will.

§ 3. REGULAR MARRIAGE —CELEBRATOR.

THE act 10th of Anne, c. 7, § 5, upon the narrative that ſince the eſtabliſhment of the preſbyterian government in Scotland, ſome laws have been made by the parliament in Scotland againſt the epiſcopal clergy of that part of the united kingdom; and particularly an act paſſed in 1695, intitled againſt irregular baptiſms and marriages, by which all epiſcopal miniſters who were turned out of their churches are prohibited, &c.; repeals the ſaid act, and declares it free for all the epiſcopal miniſters, not only to pray and preach in the epiſcopal congregations, but to adminiſter the ſacraments, *and marry* without incurring any pain or penalty whatſoever.

Anne 10, c. 7, 25.

Narrative of Anne's act.

Epiſcopals lawful to pray and preach, &c.

IT appears, therefore, that the clergy of the eſtabliſhed church, and the epiſcopal clergy, authorized as required by the above of queen Anne, are the only ones authorized to marry; excluſive of all ſpecies of preſbyterian diſſenters, ſeceders, independents, baptiſts, &c.

Only preſbytery clergy and epiſcopal clergy qualified to marry.

THIS is ſtrongly marked by the ſaid act of queen Anne, which, while it declares it lawful to all the proteſtant ſubjects *to aſſemble for divine ſervice*, gives the power of marrying only to the epiſcopal clergy.

THIS ſtatute of queen Anne, whatever may have been the views of her tory miniſtry in paſſing it, and ſome other contemporary enactments,[a] muſt be admitted to have been a juſt and proper meaſure, and indeed a natural conſequence of the incorporating union of the two kingdoms; whereby preſbytery and epiſcopacy were diſtinguiſhed from diſſenting ſectaries, and put on a level with each other as the two eſtabliſhed modes of worſhip in the united kingdom. Reaſonable, therefore, it cer-

Q. Anne's toleration act.

[a] The law of patronage, and the renewal of the Chriſtmas vacation, ſee Smollett's Hiſtory, where bad motives are poſitively imputed to them, and Dr. Sommerville's, where the matter is conſidered more at large and with great candour. P. 469, &c.

§ 3. CLANDESTINE —CELEBRATOR.

tainly was, to relieve epiſcopal clergymen from ſevere and infamous penalties for doing in one part of the ſame kingdom the very thing which they alone were competent to do in the other.

SUCH is the letter of the law. Not to miſlead, however it is neceſſary to mention that the ſame indulgence, which queen Anne's act gives to epiſcopal clergymen, is in practice extended to all thoſe, who are, *bona fide*, clergymen or paſtors of tolerated diſſenting ſects. Yet the ſtatutes are not in deſuetude. Under them, thoſe vile impoſtors, who without juſt pretenſions to the clerical character, aſſume its functions and drive a gainful trade by celebrating marriages, are puniſhed; but diſſenting clergymen never. Not one inſtance of any ſuch proſecution exiſts. So have the ſpirit of the conſtitution and the good ſenſe of the nation, corrected the letter of the law.

Relief to the epiſcopal clergy,

THIS indulgence indeed is juſtly conſidered no more than what they are well entitled to, on the ſound principles of toleration, and under the ſpirit of thoſe principles of civil liberty which were recogniſed at the Revolution.

how far to be extended.

MARRIAGE, conſidered merely as a civil contract, involving patrimonial rights and conſequences, is under the regulation of the ſtate; which may make banns, or any other civil form or preliminary, indiſpenſible, and the omiſſion thereof puniſhable.

BUT the nuptial bleſſing is a religious act with which the ſtate cannot intermeddle, without violating the rights of conſcience and religious liberty. The nuptial bleſſing and interpoſition of the prieſt in marriages, grew into obſervance among the earlier chriſtians, without the interpoſition of the ſtate. Had the Roman law held it eſſential to the validity of their marriages, or required under pains and penalties

that they ſhould be ſolemniſed in a pagan temple, and by a pagan prieſt, it would have been tantamount to prohibiting the marriages of chriſtians altogether. They would have rather braved death, in its moſt frightful forms, than ſo far countenanced the heathen worſhip. § 3. CLANDESTINE —CELEBRATOR.

PRESBYTERY and epiſcopacy, and other proteſtant denominations, are not, indeed, oppoſite to each other, like paganiſm and chriſtianity; yet the diſtinctions between theſe ſeveral modes of worſhip were not on either ſide deemed utterly frivolous and immaterial. During the bloody and tyrannous times which preceded the Revolution, the one deemed it lawful to employ fire and ſword to procure conformity, and the others again choſe to ſuffer rather than conform.

AT any rate, *majus et minus non variant ſpecies.* If the ſcrupulous conſcience of any one of the epiſcopalian perſuaſion prevented him from conſidering that worſhip which was performed by a preſbyterian clergyman in a preſbyterian kirk, lawful or acceptable, was it not wiſe and right in the ſtate to indulge his religious ſcruples, and permit him to obtain the nuptial benediction, from a miniſter with whom he was in the habit of joining in devotional acts and religious obſervances?

BANNS, indeed, were not to be diſpenſed with; but proclamation (both in the eſtabliſhed and diſſenting congregations) ſecured every object the ſtate could have in view. The interpoſition, therefore, in favour of epiſcopalians was juſt and proper.

WHY then did not that relief extend in like manner to all proteſtant diſſenters? Without recurring to the alleged views of the tory adminiſtration, which framed the act, a ſatisfactory anſwer will be found from the hiſtory of thoſe ſects.

§ 3. CLANDESTINE —CELEBRATOR.

Excepting a few Cameronians[a], of no note or conſideratic ſcattered over the ſouthern mountains, the only diſſenters the reign of queen Anne, were papiſts, on the one han who were expoſed to many diſabilities, and epiſcopals, o the other, in favour of whom the ſtatute in queſtion wa paſſed. It is not the practice of the legiſlature ever to exten relief beyond the evil exiſting at the time, and which attracte their attention.

BUT queen Anne's act ſeems to have fixed the princip and determined the public mind. For when, in proceſs time, ſeceders and other ſects aroſe, they were not perſecu ed for receiving the nuptial benediction from their reſpecti prieſts; banns taking place in the diſſenting as well as t eſtabliſhed congregations. Even at the firſt, when the recen of the ſchiſm moſt embittered men's minds, the mother chur did not attempt to hinder diſſenting clergymen from p forming ſuch clerical functions any more than from bapt ing and celebrating the ſacrament.

Irregular marriages puniſhable.

AN irregular marriage is a puniſhable offence. The p ties, as well as the celebrator and witneſſes, are liable in pa and penalties; and equally, whether the defect lie in t omiſſion of banns, or in the incompetency of the celeb tor.

—PENALTY.

THE parties, by the act 1661, c. 34, are puniſhed w three months impriſonment, beſides certain penalties[b]. A

[a] A ſect of preſbyterians who firſt appeared in the reign of Cha. II, ſo called from Cameron their leader. See Laing's Hiſt. Vol. ii, p. 699.

[b] Parl. i, Car. II.

The penalties are, for each nobleman, 1000l. Scots; each baron and landed gentleman, 1000 merks; each gentleman and burgeſs, 500l. Sc and to "remain in priſon ay "until they make payment of t "reſpective penalties." And, if perſon reſiding in Scotland, t ries with a perſon reſiding in E land or Ireland, without pre proclamation of banns, the pe

by the ſtatute 1698, c. 6 [b], the penalties are made ſtill higher, in caſe of their not declaring, when requeſted, the names of the perſon who celebrated, and of ſuch as were witneſſes to the irregular and clandeſtine marriage [c]. § 3. CLANDESTINE —PENALTY.

THE penalty by the laſt act, on the witneſſes, is to be 100l. Scots, each, to be applied in like manner with the other penalties.

THE perſon, again, who celebrates ſuch clandeſtine or irregular marriage, is, by the firſt act [d], "to be baniſhed the "kingdom, never to return therein under the pain of death;" and by the other ſtatute [e], he is liable to be ſummarily ſeized and impriſoned by any ordinary magiſtrate or juſtice of peace, and is further puniſhable by the privy council, not only by perpetual impriſonment, but by "ſuch pecunial or corporal "pains as the ſaid lords of privy council ſhall think fit to inflict."

THE charge, ſo far as it relates to the omiſſion of the banns, involves the proof of a negative. It is therefore attended with this peculiarity, that the proſecutor has ſufficient-

is, for each nobleman, 1000l. Scots; for each landed gentleman, 1000 merks; for each burgeſs, 500l. Scots; for each other ſubſtantious perſon, 500 merks; for an yeoman, 100l. Scots; for each perſon of inferior quality, 100 merks: the one half of which "ſhall belong to the king's "majeſty, the other to the paroch "or paroches where the married per- "ſons did reſide." And the king's advocate, and procurator for the kirk, are ordained to purſue for theſe penalties before the civil judge; and, in "caſe of the poor condition of any "man married in manner foreſaid, "he is to be puniſhed with ſtocks "and irons; which pains, corporal "and pecunial, ſhall no ways be pre- "judicial to, or derogate from, the "order or cenſures of the kirks, to be "inflicted againſt the delinquents."

[b] Parl. i, Will.

[c] The penalties are, in that caſe, for a nobleman, 2000l. Scots; each baron and landed gentleman, 2000 merks; each gentleman and burgeſs, 1000l. Scots; each other perſon, 200 merks: to be applied to pious uſes within the pariſhes: and farther, to be impriſoned till payment of the penalties, and till they declare the names.

[d] 1661, c. 34.

[e] 1698, c. 6.

§ 3. CLANDESTINE —PENALTY.

ly made out his caſe, if he prove the "celebration "marriage, and that no certificate of proclamation of "was on that occaſion produced to the miniſter[f]."

Proof.

By whom puniſhable.

THE general ſtatute gives the juſtices of peace no to inflict the penalties incurred by the irregular celeb of marriage. The act 1661, c. 34, appoints the pe to be purſued for by the lord advocate, and procura the church, before the civil judge; which cannot w ſuppoſed to mean juſtices of peace, who, unleſs by ſtatute, have no civil juriſdiction.

1695, by whom to be executed.

THE execution of the act 1695, puniſhing with baniſ all outed miniſters who marry or baptize, is intruſted privy council, and all other magiſtrates, judges and c of juſtices, which, no doubt, includes juſtices of the and the act 1698, c. 6 ordains the celebrator to be ſur ily ſeized and impriſoned, by any ordinary judge or j of peace; ſo that the juriſdiction of juſtices of peace ſeem to be limited to that ſpecial caſe.

when incurred.

IT is the religious act of pronouncing the nuptial diction that is here puniſhable if performed by an un fied perſon. For, "if a couple go into the preſenc "magiſtrate, and there exchange the matrimonial co "in this there does not ſeem to be any thing unlawf "the part of the magiſtrate, who does not pretend to "them, or at all to officiate in the matter, but merely "as a reputable witneſs of the act and civil contract "parties[g]."

§ 4. PARENTAL CONSENT.

IV. TOUCHING the conſtitution of marriage, that mi moſt intereſting ſubject of human legiſlation, ſo ſtan law of Scotland; in uniſon with ſound policy and t nuine principles of natural juriſprudence.

[f] Hume, Vol. ii, p. 329.

[g] Hume, Vol. ii, p. 327.

§ 4. PARENTAL CONSENT.

MARRIAGE, without the conſent, or againſt the inclination, of parents and guardians, is not merely not invalid: it is not even puniſhable by any penalty or diſability whatever; ſuch conſent not being put on the ſame footing with any of thoſe ſolemnities which are neceſſary to conſtitute a regular marriage.

YET the law of Scotland is not exceeded by that of any other nation, ancient or modern, in tender and jealous regard for parental authority and anxious endeavours to diſcountenance all appearances of diſobedience or diſreſpect by children to their parents.

BUT in regard to marriage, it wiſely deems parental authority beſt intruſted to its natural ſanctions; eſteem, gratitude, affection, and the legal power of parents in the diſpoſal of their property. *La douce perſuaſion doit l'imprimer dans les coeurs et non pas la force y contraindre.* If love prove too ſtrong for theſe motives to withſtand it, the law of Scotland deems the evil already too deſperate to admit of any remedy but the ſpeedy marriage of the lovers. "If the father, friend, or maſter, gainſtand their requeſt, "and have no other cauſe than the common ſort of men "have, *to wit, lack of goods*, and becauſe they are not *ſo high* "*born as they* require[1]," the law of Scotland diſapproves of the oppoſition of parents, as an unlawful exertion of authority: For (to uſe the homely but ſignificant words of the venerable authors of our eccleſiaſtical polity) "God's work "ought not to be hindered by the corrupt affections of "worldly men. The work of God we call, when two hearts, "without filthineſs before committed, are ſo joined and both "require and are content to live together in the holy bond

[1] Firſt book of Diſcipline, tit. Marriage.

§ 4. PARENTAL CONSENT.

" of matrimony[k]." This union of hearts, the writers on general law term marriage, *foro poli*; and from such marriage, the law of Scotland deems it unjuſt, unwiſe, and impolitic, on account of the diſinclination of parents, to withhold the ſanction of human authority. *Tædæ quoque jure coïſſent; Sed vetuere patres, quod non potuere vetare . . . . . que magis tegitur, tectus magis æſtuat ignis.*

§ 5. DISSOLUTION —DEATH, within a year and day, its effects.

V. IF either of the parties die within year and day, the tocher returns to the wife, or thoſe from whom it came; and all the intereſt, either legal or conventional, ariſing to the wife in the huſband's eſtate, returns to the huſband or his heirs[a], unleſs the contract of marriage contain a ſpecial clauſe to the contrary. But " a proviſion of land or money " made by the huſband's father, not to the wife or to the

[k] Ibid.

But while theſe liberal ſentiments were expreſſed for the encouragement of youthful attachments, it was far from the attention of theſe good men to encourage haſty and clandeſtine marriages, or to repreſent the approbation of parents as a thing of no moment—on the contrary, they conſidered the diſſent of parents as a ſerious evil, to remove which no pains ſhould be ſpared. The whole paſſage runs as follows:

" If the father, friend, or maſter, " gainſtand their requeſt, and have " no other cauſe than the common " ſort of men have, viz. lack of goods, " and becauſe they are not ſo high " born as they require, yet muſt not " the parties whoſe hearts are touch- " ed, make any covenant till farther " declaration be made unto the kirk " of God; and, therefore, after that " they have opened their minds " their parents, or ſuch others " have charge over them, they " declare it to the miniſter, or to " civil magiſtrate, requiring them " travel with their parents for " conſent, which to do they " bound. And if they, to-wit, " miniſter or magiſtrate, find " cauſe, that is juſt, why the " riage required may not be fulfilled " then, after ſufficient admonition " to the father, friend, maſter or ſu- " perior, that none of them reſiſt the " work of God, the miniſter or " giſtrate may enter in the place " parents, and be conſenting to their " juſt requeſts, may admit them to " marriage, for the work of God " ought not to be hindered by the " corrupt affections of worldly men."

[a] Erſk. B. i, c. 6, § 38.

"iſſue of the marriage, but without reſtriction to his own "ſon, which, becauſe it does not form a contract between "the married parties, but barely between one of the parties "and his father, without any ſtipulation in favour of the "wife or the iſſue of the marriage, continues in full force, "let the marriage be of ever ſo ſhort a duration[b]. If a "living child be procreated of the marriage, who has been "heard to cry, the marriage has the ſame effect as if it had "ſubſiſted beyond the year[c]." § 5. DISSOLUTION —DEATH. If a living child cry.

THE huſband muſt repay the tocher without any deduction, on account of any expence of the family during the marriage; but he is entitled to deduct his wife's funeral expences. "Where things cannot be reſtored on both ſides to "their former ſtate, it would be inconſiſtent with equity and "with the ſpirit of the law, to reſtore one party and not the "other[d]." Repays the tocher or dowry. Deducts funerals charges.

"PRESENTS, made on account of the marriage, to the "new married pair"..." or by the huſband himſelf to the "wife at the marriage, whether of ſubjects properly para-"phernal, or of common goods, ought not to be reſtored[e]." Not marriage.

The indigent widow of an opulent huſband was found entitled to aliment from the heir, though not to her legal proviſions[f]. Indigent widow alimented.

[b] Home, 132. Kilk. Huſband and Wife, No. 5. Erſk. B. v, t. 6, § 38. Lord Kilkerran ſeems not to be quite ſatisfied with the deciſion; but ſince his time the point has been decided more than once in the ſame way.

[c] Erſk. ib. 17th July 1765. It was not held ſufficient that the child breathed and lifted its arm.

[d] Erſk. B. i, p. 116. Hence, an inſeſtment granted by the huſband for the wife's jointure, was found to ſubſiſt, though the marriage diſſolved within the year, as a ſecurity for the repayment of her tocher.—20th July 1664, Petrie.

[e] Erſk. Ed. 1805, B. i, t. 6, § 40.

[f] Fac. Coll. 15th Dec 1786, Mrs. Barbara Louther againſt Murdoch M'Laine.

§ 5. DISSOLUTION —DEATH.

After year and day.

Mournings.

Aliment to the term.

WHEN marriage diſſolves after year and day, the ſurviving huſband becomes the irrevocable "proprietor of the tocher "and the wife, where ſhe ſurvives, is entitled to her jointure "or to her legal proviſions of *terce et jus relictæ*;" to mournings and aliment, from the day of his death till the term at which her liferent proviſion commences; which are to be "regulated, not by the extent of her jointure, but by the "huſband's quality and fortune, and the condition of the "family left by him[g]."

—VOLUNTARY SEPARATION,

If revocable

If he offers to receive her back.

ALL voluntary contracts of ſeparation were, by our more ancient practice, null from the beginning. But, by our late practice, they are effectual during the whole period of the ſeparation; the alimentary proviſions which they contain being granted by the huſband in conſequence of his natural obligation to maintain the wife. Still, however, they are revocable. The huſband is underſtood ſufficiently to revoke any ſuch contract, by offering to receive his wife again into the family; and the wife, notwithſtanding the exiſtence of ſuch voluntary contract, may bring an action for a ſeparation, "*a menſa et toro*[h]."

—LEGAL SEPARATION,

For what cauſes;

Alimony in ſuch caſes.

IF the huſband ſhould abandon his family, or turn his wife out of doors, or by barbarous treatment endanger her life, or even be guilty of ſuch indignities to her perſon as to render her life uncomfortable, it is competent for the commiſſary court to authoriſe "a ſeparation *a menſa et toro*, and "award a ſeparate alimony to her, ſuitable to her huſband's "fortune, to take place from the time of the ſeparation, and "to continue till there ſhall be either a reconciliation be-"tween the parties, or a ſentence of divorce[i]." But this does not looſe the nuptial tie, or leave them at freedom to intermarry with others: That requires a ſentence of divorce

[g] Erſk. B. i, t. 6. § 22.

[h] Nov. 28, 1797, Lawſon, Fac. Coll.

[i] Erſk. B. i, t. 6, § 19.

§ 5. DISSOLUTION —DIVORCE

"DIVORCE is ſuch a ſeparation of married perſons dur- "ing their lives, as looſes them from the nuptial tie, and "leaves them at freedom to intermarry with others [k]."

on what good ground.

Divorce may proceed in an action brought before the commiſſary court, at the inſtance of either huſband or wife, againſt the other who has been guilty of adultery [l]. No

No collufive divorces permitted.

divorce can proceed which is carried on by colluſion between the parties [m]. Lord Bankton ſays, "it is a good defence "againſt divorce for adultery, that the purſuer is guilty of "the like crime, for he or ſhe cannot take the benefit of "that law againſt which they offend [n]." The court of ſeſſion have found that recrimination cannot be pleaded by exception [o]. And when that point was laſt before the court, it ſeemed to be the general opinion that it was not a good defence, although the guilt was proved in a counter action of recrimination [p].

Recrimination.

[k] Erſk. B. i, t. 6, § 43.

[l] "With us in England," ſays Sir W. Blackſtone, "adultery is only a "cauſe of ſeparation from bed and "board".... "however, divorces, *a "vinculo matrimonii*, for adultery have "of late years been frequently grant- "ed by act of parliament." B. i, c. 15. The ſame formerly was the caſe in France, marriage being there conſidered as a ſacrament agreeably to the canon law. But ſince the Revolution, divorces are allowed on the moſt trivial pretences, See Vol. i, p. 98. In England, "to prevent divorces, *a "vinculo matrimonii*, from being ob- "tained in parliament, by fraud and "collufion, the two houſes not only "examine witneſſes to be convinced "of the adultery of the wife, but "they require alſo that the huſband "ſhall have obtained a ſentence of "divorce in the ſpiritual courts, and "a verdict with damages in a court "of law from one who has had cri- "minal intercourſe with the wife." Chriſtian's Note, 13. ib.

[m] Accordingly, lenocinium was found to be a good defence to the wife in an action of divorce, at the inſtance of her huſband on, on the ground of adultery. Falc. Feb. 28, 1745, M'Kenzie.

[n] B. i, t. 5, par. 128, quoting l. 39, ff. Sol. Mat. c. 6, Ex. de Adult.

[o] 9th March 1787. The court allowed the wife to repeat a counter action of divorce, but under a qualification, that by adopting that form of procedure, ſhe ſhould not be prevented from pleading the recrimination, when proved as a total bar to a decree of divorce, nor the purſuer from pleading his anſwers thereto.

[p] 7th Dec. 1799. One of the judges obſerved, "that the contrary opinion

§ 5. DISSOLUTION —DIVORCE

IT is by virtue of a ſpecial ſtatute[q], that the party, divorced for adultery, is diſabled from marrying the perſon with whom the adultery is ſaid, by the ſentence of divorce, to have been committed[r]. If the parties cohabit afterwards in the knowledge of ſuch adultery, this bars the action of divorce.

Cohabiting after knowledge of the guilt.

Deſertion.

DIVORCE is allowed on the ground of deſertion. When either party has deſerted from the other for four years together, the latter may[t] ſue for adherence before the commiſſaries, whoſe decree the court of ſeſſion may inforce by letters of horning. If theſe have no effect, the church is to proceed, firſt by admonition, then by excommunication; which previous ſteps are declared to be a ſufficient ground

" had ariſen from not diſtinguiſhing " betwixt ſeparation, *a vinculo matri-* " *monii*, and the civil effects thereof; " that recrimination may alter the " latter though it cannot prevent the " former." The lord preſident obſerved, " that if recrimination was " competent at all againſt a divorce, " it would be competent as an excep- " tion; but the contrary was found " in the caſe of Sir William Jardine. " If both parties purſue, the civil " conſequences muſt neceſſarily be " affected. Two adulteries form a " double ground for diſſolving mar- " riage. This is a different thing " from diſſolving marriage by collu- " ſion or mutual conſent. For ſuch " an object, had it been in view, one " adultery would have been ſuffi- " cient."

[q] 1600, c. 20.

[r] The canon law permits the adulterer, after the marriage is diſſolved by the wife's death, to intermarry with the very woman with whom he was guilty, except in the ſpecial caſe where the adulterers had contrived and had been acceſſary to the death of the wife. Decretal. Greg. l. iv, t. c. 6.

[s] A wife had been very much ill treated by her huſband, and obliged to leave him, but returned on promiſe of amendment. This happened more than once. Afterwards, finding him likely to continue his mal-treatment, ſhe left his family, and brought an action for ſeparation, *a menſa et thoro*, and offered a proof of all the mal-treatment from firſt to laſt, as a reaſon for obtaining decree. It was objected, that ſhe ſhould be allowed to prove only what was ſubſequent to the laſt reconcilation. But the court were clear that the analogy of what is obtained in the caſe of adultery, did not apply to the caſe of mal-treatment, and that it was competent to prove the whole of his mal-treatment, from firſt to laſt, in order to ſatisfy the judge that there was good ground for ſeparation.

[t] 1573, c. 55.

for ſuing for a divorce. *De praxi*, the commiſſaries pronounce ſentence in the adherence after one year's deſertion; but four years muſt intervene between the firſt deſertion and the decree of divorce [u]. § 5. DISSOLUTION —DIVORCE

If the marriage be diſſolved in conſequence of the adultery of the huſband, and there be no contract of marriage, the wife gets her legal ſhare of the goods in communion, and her *terce*, juſt as if the huſband were dead. In like manner, if the wife be the offending party, the huſband divides the goods in communion with her, juſt as he would have done with her executors had ſhe been dead. And if the legal rights be ſuperſeded by a marriage contract, it takes effect in favour of the innocent perſon, as it would have done by the death of the party guilty. Eff. & of divorce. Adultery. If the huſband, if the wife, be the guilty party.

But if the divorce proceed on the head of deſertion, the guilty perſons are ordained "to tyne and loſe their "tocher [x];" by which, ſays Mr. Erſkine, "when applied "to our law, muſt be underſtood the proviſions that the wife "is entitled to, either by law or by paction, in conſideration "of the tocher; and the meaning of the act is, that the "offending huſband ſhall reſtore the tocher, and forfeit to "the wife all her proviſions legal and conventional; and, on "the other hand, the offending wife ſhall forfeit to the huſ"band her tocher, and all the rights that would have be"longed to her in the caſe of her ſurvivance [y]." If on deſertion.

VI. Modestinus calls marriage *divini et humani juris communicatio* [a]. Which definition, in regard to the civil or patrimonial conſequences at leaſt [b], ſeems to deſcribe the § 6. RIGHTS AND INTERESTS —COMMUNITY.

[u] Erſk. B. i, t. 6, § 44.
[x] James VI, parl. 4, 1573, c. 55.
[y] Erſk. B. i, t. 6, § 25, octavo edit.
[a] Ff. L. i, De Ritu Nuptiarum.
[b] The Roman wife became entitled to the protection of her huſband's houſhold gods (*penates*), and entitled

§ 6. RIGHTS AND INTERESTS —COMMUNITY

ſtate of marriage with ourſelves better than among the Romans; where, in ſeveral reſpects, huſband and wife were conſidered as diſtinct perſons with ſeparate properties and intereſts [c].

If the rank be profeſſional only.

Peer's widow marrying one of an inferior title,

or a commoner.

THE wife enjoys the ſame rank and precedency with her huſband, except ſuch as is merely profeſſional or official [d]. So much ſo, indeed, that the widow of a peer who marries a commoner loſes her rank. But if the widow of a duke, for example, marry a nobleman of inferior title, ſhe continues a ducheſs ſtill, for all the nobility are peers; and therefore, it is no degradation [e]. Even the widow of a peer marrying a commoner, "is commonly called and addreſſed "by the ſtile and title which ſhe bore before her ſecond mar"riage, but this is only by courteſy; as the daughters of "dukes, marquiſſes, and earls, are uſually addreſſed by the "title of a lady, though in law they are commoners [f]." But a peereſs in her own right gives no rank to her huſband, nor loſes her own rank by marriage.

Community of goods.

THE common intereſt of huſband and wife, in their reſpective effects, is ſtyled the *communion of goods*. As marriage continues no longer than the joint lives of the two individuals, ſo the community reſulting from it includes no rights, on the one hand, which, without periſhing in the uſe, may be tranſmitted from one generation to another [g]; but all

to join the family worſhip that was regularly offered to them. See Hein. Antiq. lib. i, tit. x, § 4.

[c] See the book of the Codex, which is entitled "Ne uxor pro marito, vel "maritus pro uxore, vel mater pro "filio conveniatur."

[d] Black. B. i, c. 12, p. 406.

[e] Ibid. p. 401.

[f] Ibid.

"In a writ of partition, brought "by Ralph Haward and lady Ann "Powes his wife, the court held that "it was a miſnomer, and that it ought "to have been by Ralph Haward and "Ann his wife, late wife of lord "Powes deceaſed." Dyer, 79.

[g] As a land eſtate, a tenement or houſes, a right of tithes; nay, a debt of borrowed money if it carries intereſt, which is *feoda pecuniæ*. Eſſay B. i, t. 6, § 12.

§ 6. RIGHTS AND INTERESTS —COMMUNITY.

rights, on the other hand, of a temporary nature, and producing no yearly profits, (except *paraphernalia*, which are exclusively the wife's property, though they were given to her by the husband subsequent to the marriage[h];) even the yearly rents of lands, &c. or interest of bonded money; and even the arrears of a wife's jointure by a former husband[i].

Division of goods.

On the death of either party the goods in communion fall to be divided.

If no children.

If there be no children, one half goes to the surviving spouse, and the other half to the relations of the deceased.

If children.

If there be children, the goods undergo a *tri-parte* division.

If the husband die.

If the father die, leaving widow and children, one third goes to the widow; another third goes to his children equally among them, whether of that or any former marriage, as legitime; and the other third is considered the dead's part, which, if the defunct has not otherwise disposed of it, will go to the children in right of succession.

If a widow and children.

Dead's part.

If no widow but children.

If the deceased left no widow, but children, they will take one half as legitime, and the other half as dead's part.

If a widower and children.

In like manner, if the wife predecease, leaving children, the goods in communion are supposed to be divided in three shares; two thirds remain with the father, one is due to him in his own right, and the other as legitime, of which he continues to have the administration as before, for behoof of his children; and the remaining third divides among her children,

[h] See Vol. i, p. 124, note 6.

[i] With respect to this last case, Lord Kilkerran says the court were not unanimous, as the first husband had provided by the marriage contract, that each term's annuity should bear interest if not paid.

§ 6. RIGHTS AND INTERESTS —COMMUNITY.

whether of that or any former marriage, *in capite*. has no children, it will go to her neareſt of kin [k].

THE intereſt of the wife and children in the comm depends upon its value at the diſſolution of the ma

Value, at the diſſolution, is the rule.

If it be diminiſhed or exhauſted, they muſt ſuffer; the other hand, if its value be increaſed, they are gain

IF the wife was infeft in heritage at her death, th

Liferent;

band by courteſy enjoys the liferent of it. And if th band, predeceaſing, was infeft in heritage, the wife h

terce.

terce, or the liferent of a third of it.

THE huſband has the entire right of management

Jus mariti.

can even gratuitouſly give away the goods in comm but he cannot bequeath or diſpoſe of them by any teſ or *mortis cauſa* deed to take effect at his death.

The wife cannot ſue without his conſent.

HE has even the right of managing ſuch property ; not fall under the *jus mariti*. With reſpect even to he able property, the wife cannot do any thing without h ſent and concurrence. Without his concurrence ſhe ſue; nor be ſued without he be made a party to t

[k] Perſonal bonds, bearing intereſt, it was obſerved, do not fall under the community; but, in reſpect of ſucceſſion, they are moveable by act 1661, c. 32. The legitime and dead's part, therefore, they increaſe, though not the ſhare of the widow: and as ſuch bonds, when due to the huſband, do not benefit her; ſo, when they are due by him, they do not leſſen her ſhare of the effects, but are a burden altogether upon his children or next of kin. Theſe obſervations concerning the legitime and *jus m* queſtions with the widow, and next of kin, are not appl the caſe of a competition creditors of the deceaſed. eſtate falling under comma ever ſo large, if there be debts due by the deceaſed m will exhauſt it, the creditors can affect the whole exec their payment. Erſk. B. § 22.

tion: but deeds *mortis cauſa*, not having an effect till the diſſolution of the marriage, ſhe may execute without it. § 6. RIGHTS AND INTERESTS —COMMUNITY.

EVEN with his conſent a wife cannot come under any perſonal obligation. With reſpect to the wife herſelf, as well as her huſband, a bill or bond granted by her, is entirely null. Even when ſhe is *propoſita negotiis*, or entruſted with the management of any buſineſs, ſhe does not bind herſelf, but her huſband only. Cannot perſonally bind herſelf. *Propoſita negotiis.*

THE wife has naturally the management of the family: "in which character ſhe hath power to purchaſe whatever "is proper for the family; and the huſband is liable for the "price, even though what was purchaſed may have been "applied to other uſes, or though he may have given the "wife a ſum of money *aliunde* ſufficient for the family ex-"pence [l]." Natural *propoſitura.*

THIS *præpoſitura* ceaſes if the wife live apart from her huſband; or if he *inhibite* her, "the huſband is not liable "for any debt contracted by his wife after inhibition, ex-"cept for ſuch furniſhings, ſuitable to her quality, as he "cannot prove that he provided her in *aliunde* [m]." A huſband having left Scotland in bankrupt circumſtances, his wife entered into trade to maintain herſelf and her children, and having granted a bill, was, as an unmarried woman, found liable to *perſonal diligence*, or execution [n]. If they live apart?

THE huſband has alſo the power of fixing the family reſidence. In France, this doctrine is ſaid by M. Pothier, to be ſo far limited, that a wife cannot be compelled to accom- Family reſidence.

[l] Dirl. 310; Harc. 871; Erſk. B. i, t. 6, § 26.

[m] Goſf. June 23, 1675; Auchinleek, July 25, 1676, Campbell. Erſk. B. i, t. 6, § 26.

[n] Fac. Coll. July 11, 1789, Churnſide againſt Currie.

§ 6. RIGHTS AND INTERESTS —COMMUNITY

pany her husband to a foreign country [n]. The questio believed, has not yet occurred in our courts. Pothier nion seems in unison with that of Cicero, when h " *an potest cognatio ulla propior esse, quam patriæ in q* " *rentes etiam continentur* [o] ?"

Ratification.

LEST this *maritalis potestas* should be employed to t judice of wives, deeds granted by them, in favour o parties, with the consent of their husbands, are rev unless they be secured by ratification [p]; that is, sh appear before a judge, and swear that she was not i to grant the deed *vi et metu*. This renders the deed i able, even although consequentially it should benefit t band.

Donations.

BUT pure donations in favour of the husband are r subject of ratification, but are always revocable; as a those of the husband to the wife, *ne conjuges mutuo am spoliarent.*

Husband's liability.

THE husband having the sole management of the in communion, is liable for his wife's debts, even thos tracted before marriage; as if she had granted a bill

[n] Tom. iii, p. 456.

[o] In the late case of sir James Colquhoun, the court of session sanctioned what to some appeared a still stronger exercise of this *maritalis potestas*. They found that the husband could dismiss his wife from the family, provided he furnished her with another house, and money to live apart suitably to her rank. This decision was far from being unanimous. The judges, who were in the minority, observed, that the husband's powers were *as head of the family*. troulable they allowed him t every thing relating to the r ment of the family, as to t dence, &c.; but it was co that he could not, of his own ity, thrust her out of doors, this was depriving her of h and must be presumed an a act, till it was sanctione judge, on advising all circu 7th March 1804. Fac. Coll.

[p] 1481, c. 84.

§ 6. RIGHTS AND INTERESTS.

a merchant's account for goods, cloaths, &c. the husliable; and equally whether ſhe brought any tocher r or not [q]. Yet, in all ſuch queſtions, the wife is ed the proper debtor; the huſband being called only intereſt, and as managing the community. Of courſe, : diſſolution of the marriage, he ceaſes to be liable debts; unleſs either his eſtate had been attached by e legal diligence during the marriage [r]; or unleſs he *tus*, that is, enriched by her eſtate, which will be of according to the ſituation of the parties and their n in life. A moderate tocher is not conſidered as a huſband *lucratus* [s]. The huſband, even though *lu*s liable only *ſubſidiarie*; that is, if the wife's own eſtate proves inſufficient [t]. The huſband is not liathoſe debts due *by* the wife, which, had they been ıer, would have made no part of the community. f the wife was owing a bond, the huſband is not liathe principal, but for the intereſt only; viz. the arnd what may fall due during the marriage.

Wife's bills granted before marriage.

Wife the proper debtor therein,

Diligence uſed againſt the huſband.

Lucratus.

What ſort of debts?

RIAGE contracts are either poſt-nuptial or ante-nuptial. ptial contracts are equally irrevocable with the other, : as they are fair and moderate; for ſo far they are that is, not gratuitous. Their irrevocability, there-

Contracts, *poſt* or *ante*-nuptial.

ance, M. Pothier ſays, that ers thought that the huſng, as chief of the commu- liable *in ſolidum* for ſuch ſtill continued to be ſo after ution of the community; e himſelf, on the contrary, hat the huſband then ceaſed e *principally*, except for one le, however, he continued for the other half *ſubſidiarie*. yant été débiteur qu'en ſa de chef et ſeigneur de la nauté, cette qualité venant " à ſe reſtreindre par la diſſolution " de la communauté (lorſqu'elle eſt " acceptée par les heritiers de la " femme) à celle de commun pour " moitié."—Droit Civil, &c. Tom. iii, p. 827.

[r] Diligence againſt his perſon will not do. Haddington, 26th Feb. 1723, Douglas, nor diligence againſt his eſtate if incomplete, 23d Jan. 1678, Wilkie.

[s] 23d Dec. 1665, Burn.

[t] Falconer, 54.

§ 6. RIGHTS AND INTERESTS —CONTRACTS.

fore, will depend on their adequacy and ſuitableneſs under all the circumſtances of the caſe.

Lord Gardenſton's opinion.

MARRIAGE contracts are as various as the views and intentions of parties [u]. "It is unneceſſary for me," ſays Gardenſton obſerves, "to lay before country gentlemen the "nice diſtinctions of lawyers from which ſuch queſtions "have ariſen. It is ſufficient to ſuggeſt a plain and proper "caution by which they may avoid ſuch doubts and con"troverſies. In all contracts of marriage, wherein land or "money is provided, in the form of conjunct fee and life "rent to the huſband and wife, and to the heirs of the "marriage, &c. in fee, the addition of two or three words "will ſerve to explain the ſenſe of parties, and prevent "queſtions of this nature only by adding the words, *for the* "*wife's, or for the huſband's, liferent uſe allenarly*," as parties are agreed [x]; if parties mean the right to carry no more than the liferent. Farther, "it is very material to adver"that the proviſions for the wife, in caſe ſhe ſurvive her "huſband, be expreſſed as *in full ſatisfaction of all her legal* "*claims in that event*, and that they are *alſo in full ſatisfac*"*tion* of any claim her executors can have in the event that "ſhe predeceaſe her huſband." And alſo, that they are to take effect, though the marriage diſſolve by death within year and day [y].

[u] In general, however, they may be reſolved into three diſtinct claſſes. Either, 1ſt, the property is veſted in truſtees for the purpoſes of the contract, and the father is denuded; or, 2dly, the contract may prohibit the father from contracting debt, which may be enforced by interpoſition of a cautioner or by warrandice, or there may be an obligation at a certain period to denude; or, 3dly, the contract ſimply ſettles the property on the father and the heirs of the marriage, which only bars gratuitous deeds. According as the deed is made out in one or other of theſe ways, the children are more or leſs ſecured. But, with reſpect to their phraſeology and conſtruction, which may give riſe to important queſtions in *apicibus juris*, it would not be poſſible to ſtate any thing uſeful in practice without going into too long detail.

[x] MS. tit. Marriage.

[y] Ibid.

criminal matters, huſband and wife have no common
t, but muſt anſwer ſeverally for their reſpective
neanours. The wife may be impriſoned, or other-
orporally puniſhed, as the caſe may require. But,
ur neighbours in England, "if a woman commit
, burglary, or other civil offences, againſt the laws
ociety, in her huſband's company, which the law
trues a coercion; ſhe is not guilty of any crime,
g conſidered as acting by compulſion, and not of
own will: which doctrine is at leaſt a thouſand
s old in this kingdom, being to be found among
laws of king Ina the Weſt Saxon [z]." With us, on
ntrary, in Scotland, the wife is not treated with ſo
ndulgence. "If the huſband and wife go out together
ſteal, or, if the huſband ſteal, and the wife receive
poil into her private repoſitaries and particular keep-
or, if the huſband forge the notes, and the wife is
loyed to put them in circulation, we will rather be
ſed to follow the precept of the old law of William
uch caſes, which holds both for guilty, and puniſhes
s according to their demerits [a]." No criminal proſe-
however, can go on againſt her without calling her
d [b]. The wife cannot even wave the defence that her

§ 6. RIGHTS AND INTERESTS —CRIMINAL MATTERS.

Have they a common intereſt?

kſt. B. iv, p. 28.
e, Criminal Law, Vol. i, p. 43. contrary ſeems to obtain in
Helen Bent was delivered hard child. Thereafter ſhe
The juſtices made an order on, charging her with 8d. owards the relief of the par- till payment thereof commit- to the houſe of correction. brought up by *habeas corpus*. nion delivered by the court was, that "a *feme covert* is liable to "be proſecuted for crimes commit- "ted by her. This woman has diſ- "obeyed the order of the juſtices, "and the ſtatute preſcribes the pun- "iſhment here inflicted upon her. "There is no need to ſummon the "huſband in a criminal proſecution "againſt the wife." Burrow, Mansf. 1681. E. 5, Geo. III. See Dr. Burn. tit. Baſtard.

§ 6. RIGHTS AND INTERESTS —CRIMINALS.

husband is not called [c]. For, even in such matters, the husband is understood to be *dominus litis*, and responsible to certain extent for the right conducting of the litigation [d].

Even in criminals the husband is *dominus litis*.

Husband not liable for fines.

BUT, for those sums, whether in name of damages or fine that may be awarded against the wife on account of any such delinquency, the husband is no more personally responsible than for any corporal punishment to which she may be sentenced. In the one case, he no more *luit in ære*, than, the other, *in pelle* [e]; which, indeed, seems to be a principle not of municipal merely, but of constitutional law. For, the memorable declaration of the Scottish estates, that king James the seventh "hath forfaulted his right to the "crown [f]," particularly mentions, amid other grievances

[c] Isabel Freebairn, and Muir her husband, against Helen Grant; 8th Dec. 1749. In this case the court found, "that the process could not "proceed, the husband not being "called, which objection the wife "could not wave." The court therefore suspended "a decree of the commissary of Glasgow, obtained at "the instance of Isabel Freebairn "against Helen Grant, decerning "her to stand at the court door for "half an hour, with a label above "her head, acknowledging her "crime, in uttering certain injurious "expressions against the said Isabel, "and to subscribe a recantation, all "under the penalty of 10l. sterling, "and afterwards decerning in the "penalty as incurred." Kilk. Tit. Husband and Wife, No. 15.

[d] 19th Feb. 1790, Chalmers against Douglas and husband. The wife, for defamation, was found liable in a fine and damages. The court of session found the husband liable in the expence of the action. But the house of peers "remitted back the cause "the court of session, to inquire how "much of the said sum of expence "of process had been occasioned by "the conduct of the defender in the "cause, as he was responsible for the "conduct of the cause, in so far as "the same was malicious, vexatious "and calumnious." Dict. Vol. iii, tit. Husband and Wife.

[e] This is the common law; if particular statutes make any exception such statutory liability is law applicable to such particular cases only. (See under the article "Plantation "and Enclosing," where there is an example of such liability, though rather in appearance than reality.

[f] See "Declaration of the Estates "of the kingdom of Scotland, containing the Claim of Rights and Offer of the Crown to their majesties "king William and queen Mary." Scots Acts, Vol. iii, small edit. p. 1

ough, during the ſubſiſtence of the marriage, the wife
e corporally puniſhed, as by impriſonment, ſcourging,
ment, pillory, yet, till the diſſolution of the mar-
perſonal execution will not iſſue againſt her for com-
her to pay any ſum of damages or of fine ſhe may
ncurred by her delinquency; becauſe, till then, hav-
power over any part of the community, nor, of
any funds wherewithal to pay, ſhe cannot juſtly be
ous to that diligence or execution which is not pen-
t merely a *compulſitor* for procuring payment. In
nd, we have ſeen[5] it was held lawful to impriſon a
d woman, for payment of the ſum awarded againſt
or the aliment of a baſtard child, which ſhe had born
ther man before her marriage. Such a caſe, with us,
be decided differently. If the ſum be conſidered,
one hand, as a fine ariſing from delinquency, execu-
ould be ſuſpended till the diſſolution of the marriage;
the other, it be conſidered as a civil debt, execution
go out againſt the huſband, and not againſt her.

[5] Vide ſupra, p. 235.

CHAP. IX.

Of Parents and Children.

§ 1. THEIR DUTIES IN GENERAL.

I. PARENTS and children are by nature under reciprocal obligations to each other. This law is written on our hearts (as lord Stair emphatically ſays) "with capital "letters [a]." "Though evil cuſtom hath put out the eye "of natural light in other things, yet, in this, the rays of "the ſun of righteouſneſs are ſo direct, that their illumination "cannot be extinguiſhed [b]."

THESE reciprocal duties muſt, in moſt caſes, be left to the light of natural conſcience, and cannot be enforced by human laws. Some groſſer breaches of the duty, however, may be brought under the cognizance of the criminal magiſtracy [c].

[a] Inſtit. B. i, t. 5. [b] Ibid.

[c] Thus the ſtatute 1661, c. 20, ordains, "that whoſoever, ſon or "daughter, above the age of 16 "years, not being diſtracted, ſhall "beat or curſe either their father or "mother, ſhall be put to death with "out mercy; and ſuch as are within "the age of 16 years, and paſt the "age of pupillarity, to be puniſhed "at the arbitriment of the judge "according to their deſervings, the

§ 2. LEGITIMATE CHILDREN.

II. CHILDREN are either legitimate, or ſpurious and baſtards.

A LEGITIMATE child is born in lawful wedlock, or within a competent time after the diſſolution of the marriage.

Preſumption in favour of legitimacy.

THE preſumption that the huſband is the father of the child, cannot be defeated but by direct evidence that it was impoſſible; as, for example, where he is impotent, or has been abſent till within ſix lunar months before the birth, or where the child is born after the tenth month from the huſband's departure from the country, or death [d].

IN England, "if a man dies, and his widow ſoon after "marries again, and a child is born within ſuch a time, as "that, by the courſe of nature, it might have been the child "of either huſband; in this caſe, he is ſaid to be more than "ordinarily legitimate; for he may, when he arrives to years "of diſcretion, chooſe which of the fathers he pleaſes [e]."

"others may hear and fear, and not "do the like." This act has been found not to extend to a parent by affinity. M'Kenzie and Mr. Hume ſeem inclined to think that it would not extend to the grandfather. Hume, Vol. ii, p. 39.

[d] Mr. Erſkine ſays, "that it is not "required by our uſage, as it is ſaid "to be by that of our neighbours in "England, that one of the ſpouſes "muſt have been out of Britain; but "the diſtance between them ought "to be ſo great as to carry full evi"dence with it, that they could not "have cohabited during the whole "time libelled." St. B. iii, t. 3, § 42 Erſk. B. i, t. 6, § 50.

Mr. Chriſtian obſerves, "It uſed "to be held that when the huſband "was lying within the kingdom, "acceſs ſhould be preſumed, unleſs "ſtrict proof was adduced that the "huſband and wife were all the time "living at a diſtance from each other; "but the courts have relaxed that "rule, and have gone the length of "holding that the legitimacy or il"legitimacy of the child of a mar"ried woman, living in a notorious "ſtate of adultery, under all the cir"cumſtances, is a queſtion for a jury "to determine.' 1 4 T. R. 356. & 251. Blackſt. B. i, c. 16, Note 8.

[e] Blackſt. B. i, c. 16, p. 456.

§ 2. LEGITIMATE CHILDREN.

IF either father or mother have once acknowledged the child as lawful, it cannot afterwards be deprived of its legitimacy by the oath even of both of them [f].

Bona fides of either parent.

A MARRIAGE, we have already ſeen, may be null, on account of the propinquity of the parties, or of the previous marriage of one of them. If either of the parents were ignorant of the nullity at the date of the marriage, the canon law holds that *bona fides* ſufficient to legitimate the children [g]; which principle, Craig [h] and lord Bankton [i] incline to think is adopted by our own law.

IN England, if the marriage be not declared void on account of the propinquity during the lives of the parties, the courts of common law will not ſuffer the ſpiritual courts to declare ſuch marriages to have been void, to the effect of baſtardiſing the children. And, therefore, when a man had married his firſt wife's ſiſter, and after her death, the biſhop was proceeding to annul the marriage, and baſtardiſe the iſſue, the court of king's bench granted a prohibition *quoad hoc*, but permitted them to proceed to puniſh the huſband for inceſt [k]. So alſo the children of a marriage between an adulterer and adultreſs are legitimate, though ſuch marriages are prohibited by the act 1600, c. 20 [l].

Adulterer and adultreſs.

THOSE alſo are in every reſpect legitimate children, whoſe parents afterwards intermarry, our law completely adopting the ſentiment of Pope Alexander III, *Tanta eſt vis matrimonii*

f Craig, de Feud. Lib. ii, d. 18, § 20. Erſk. b. i, t. 6, § 49.

g The canoniſts enter into various diſtinctions, not neceſſary to be here mentioned; as, whether *bona fides* muſt ſubſiſt at the birth, or is required at the conception only. Decret. Gregor. ix, Lib. 4, tit. 17, c. 14. See Pothier, Droit Civil, &c. Tom. iii p. 332.

h De Feud. Lib. ii, D. 18, § 18, 19.

i Inſtit. B. i, tit. 5, § 1.

k Blackſt. B. i, c. 15.

l Erſk. B. i, t. 6. § 51.

ut qui antea ſunt geniti poſt contractum matrimonium legitimi habeantur[i].

§ 2. LEGITIMATE CHILDREN.

FOR the ſame reaſon, even thoſe of the children who die before their father's marriage with their mother, are yet conſidered as legitimate. For example, the eldeſt ſon ſo dying, and leaving a ſon, the latter will ſucceed to heritage in preference to his uncles.

THIS preſumption ſuppoſes always that it was lawful for the parties to have been married together when the child was begotten[k]. A marriage entered into any time during

[i] Decret. Gregor. Lib. iv, t. 17, c. 6. Legitimation, by ſubſequent marriage, was firſt introduced by Conſtantine, in the law 5. Cod. de Nat. Lib. Juſtinian, in the 10th and 11th law, extended it in two particulars; the father got this power of legitimation, though he had children by a lawful marriage, provided it was diſſolved before his illicit connection; and likewiſe whatever was the quality of the woman. By the Roman law, thoſe only could be legitimated by ſubſequent marriage who were born in concubinage, which was a ſpecies of natural marriage authorized by the law. The canon law, however, has extended it. And as this legitimation proceeds upon the fiction, that the parties were married at the date of the firſt conception, the children thus legitimated ſucceed in preference to the children born after the marriage. This the latter cannot complain of; ſince, as Juſtinian remarks, it is to the father's affection for the other children that they owe his marriage with their mother, and, of courſe, their own legitimacy. L. 10, Cod. de Nat. Lib.

In France, though the canon law of itſelf has there no force, yet, ſays M. Pothier, "*l'équité et la faveur que* "*ces principes renferment, nous les ont* "*fait embraſſer.*" Ibid. V. iii, p. 320.

England has loſt the benefit of this regulation, by the *nolumus mutare* of the barons, at the parliament of Merton. Yet, in England, if a man marry a woman *great with child*, the marriage legitimates the child though born an hour after. Since marriage has a retroſpective operation ſo far, it is not eaſy to perceive the conſiſtency of ſtopping ſhort there. If the *ſubſequent* marriage have virtue ſufficient to legitimate thoſe previouſly *begotten*, it does not ſeem very conſiſtent to deny its virtue to legitimate the children previouſly *born*; a humane and ſalutary proviſion, ſtrongly inviting to reformation by removing the *ſtigma*, which neceſſarily attaches on every family ſome of whoſe members are illegitimate.

[k] Craig puts this queſtion:— If, after a man has children by a concubine, he ſhall marry and beget law-

§ 2. LEGITIMATE CHILDREN

life, even *in agone mortis* [l], has this effect. It was othe wise in France. If at the time of the marriage any of t parties were labouring under a deadly diſeaſe, the law death-bed prevented ſuch marriage from legitimating t children [m].

—MAINTENANCE.

PARENTS may be compelled by the magiſtrate to mai tain their children [a]. A father has the abſolute right diſpoſing of his children's perſons, of directing their ed cation, of moderate chaſtiſement; which right, indee may be ſaid, during childhood, to be almoſt unlimite And even after they become *puberes*, he may compel the to live in family with him, and to contribute their l bour and induſtry, while they continue there, towards h ſervice; which power of compulſion laſts, in lord Stai opinion [b], after their majority [c].

ful children, and this marriage diſſolving by his wife's death; he ſhall marry the mother of his baſtards —will the children legitimated by this ſecond marriage be preferred in the ſucceſſion of his eſtate to the children of his firſt marriage? And he reſolves it thus: That the children of the firſt marriage will be preferred, having a *jus quæſitum* or right, eſtabliſhed, which the father's ſubſequent marriage could not defeat. Yet the children legitimated by the ſecond marriage will take the inheritance in preference to collateral heirs. De Feud. p. 368.—Lord Bankton delivers a different opinion upon this queſtion. Inſtit. B. i, t. 5, § 44. —"But I think," ſays lord Gardenſton, "Craig's opinion is the "ſoundeſt authority." MS. *voce* Baſtard. — Mr. Erſkine ſays, the contrary is a hard doctrine. B t. 6, § 52.—Which, however, V learnedly and decidedly ſupports But with our lawyers M. Poth coincides in opinion, upon this w rational ground: viz. "Quoi'qu "ſoient venus au monde avant q "ils ne ſont néanmoins nés à la "mille de leure pere qu'après e "par le ſecond mariage que leur p "a contracté avec leur mere. Ce "cond mariage. qui les a légitim "les fait reputer enfans de ce ſec "mariage. Or il ſeroit abſurd "des enfans du ſecond mariage "ſent les Ainés de ceux du "mier." T. iii, p. 328.

[l] Voet, lib. xxv, tit. 7, § 11.
[m] Pothier, Droit. Civil, &c. t.
[a] Erſk. b. i, t. 6, § 53.
[b] L. 5, 13.
[c] Erſk. B. i, t. 7, § 36.

§ 2. LEGITIMATE —MAINTENANCE.

CHILDREN, though in family with their father, are capable of receiving ſums in gift or legacy, either from ſtrangers or from the father himſelf, which thereby become their property. But the father, as their tutor and curator, has the adminiſtration thereof, unleſs it has been expreſsly excluded, or unleſs ſuch child be forisfamiliated; that is, has left the family, and is ſupported without his father's aſſiſtance. But, a child who gets a ſeparate ſtock from the father, for carrying on any trade or employment, even though he ſhould continue in the father's houſe, may be ſaid to be emancipated or forisfamiliated, in ſo far as concerns that ſtock; for the profits ariſing from it are his own.

Property of children.

Father's adminiſtration.

IF the child, even after majority, be unable to ſupport himſelf, his parents are bound to maintain him. And failing the father, the ſame obligation extends to the paternal grandfather, and ſo upwards to the other aſcendants by the father; and failing theſe, to the mother, and the aſcendants by her[d]; though neither the paternal nor maternal grandfather, or remoter anceſtors, have any part of thoſe powers and right of adminiſtration which belong to the father. It has been found that a father is liable to maintain the wife[e], but not the widow[f], of his ſon.

If the child after majority is in poverty

Grandfather when liable.

Mother, &c

Has the grandfather any power of management?

THE father's obligation ariſes alſo from the principle already mentioned, that one third of the goods in communion

Father's obligation whence?

[d] Erſk. B. i, t. 6, § 56.

[e] Helen Adam againſt Andrew Lowther, 1ſt March 1762, Fac. Coll. "entitled, Proprietor of an entailed "eſtate bound to aliment his eldeſt "ſon's wife."

[f] Iidem, ibid. 14th June 1765, and el. Dec. 220. The ſon, who had left e country before the aliment was pplied for, having thereafter died, it was recalled. In the caſe of ſir Stair Agnew, 8th June 1805, ſome of the judges expreſſed an opinion that there might be room for reconſidering the point, at leaſt, wherever there was iſſue of the marriage, whereby the widow's connection was ſtill maintained with the family of her father-in-law.

§ 2. LEGITIMATE —MAINTENANCE.

of which he has the management, belongs to the c During his life he has the unlimited diſpoſal of th goods in communion; but he cannot, by any teſta *mortis cauſa* deed, affect the legitime or third belo his children.

Legitime.

THIS third, or, when there is no widow, half, divide the children equally, though of ſeparate marriages.

IF the eldeſt ſon ſucceed to a landed eſtate, he part of the legitime, or of the dead's part. If a child r the legitime, it is the ſame thing as if he had died: l divides among the reſt; but he does not thereby right to the dead's part, if he does not alſo renou ſhare in the father's executry.

Collation,

A CHILD having a proviſion from the father, cann any ſhare of the legitime without *collating*; that is, throw ſuch ſeparate proviſion into one ſtock with t time, that the whole may be divided equally; unleſs, deed, it ſhall appear that the father intended it as a *pr* This *collation* takes place only in queſtions among who are entitled to the legitime. The widow is nc to increaſe the legitime by collating donations gi by her huſband: on the other part, the children obliged to collate their proviſions in order to incr ſhare [e].

only among children,

not with the widow.

Children bound to maintain their parents.

CHILDREN are bound to maintain their parent they fall into decayed circumſtances; which duty, I kine ſays, is enforced alſo by the civil ſanction [f]. A father's death, the eldeſt ſon, ſucceeding to the her

Maintenance among brethren.

[e] If a man leave a widow and one child, who ſucceeds to his heritage, ſtill the ſociety goods divide in three, becauſe ſuch only child is a legitime.

[f] B. i, t. 6, § 58.

§ 2. LEGITIMATE —MAINTENANCE.

obliged to aliment his younger brothers and ſiſters, if left unprovided. The repreſentatives of a grandfather are, agreeably to the lateſt deciſions, not liable; becauſe, were this obligation to go beyond the repreſentatives of the immediate parents, there would be no knowing where to ſtop [g]. Such queſtions are competent before the judges ordinary; whether they are ſo before the ſeſſions of the peace is not ſo clear; but this we had already occaſion to take notice of [h].

§ 3. BASTARDS.

III. SPURIOUS children, or baſtards, muſt be maintained by their parents. Baſtards derive their name of ſpurious from their being ſaid to be *fine patre*. And, in their caſe, it is neceſſary to bring evidence of the man's connection with their mother within the legal period [i].

Woman's oath in ſupplement as to the father.

BUT, as the guilt in ſuch a caſe does not admit of direct evidence, it has become cuſtomary to admit the woman's oath in ſupplement: but this ought never to be done, unleſs there be real grounds of ſuſpicion againſt the man; as, for example, where there is a proof of indecent freedoms with the woman, and ſubſequent opportunity; for no anxiety to free the public from the burden of the maintenance, ought to induce juſtices, raſhly, to admit an oath in ſupplement without ſuch foundation in the circumſtances of the

[g] Seton, &c. againſt Paterſon, 25 June 1761. And, accordingly, a brother having ſucceeded to a very large fortune, an application was made to the court to authorize his tutors to allow a ſum to his ſiſter; the court refuſed to interfere, leaving to the tutors to take ſuch reſponſibility upon themſelves. Clerk of Pennycuick.

[h] Vol. i, p. 103.

[i] In England, when a woman is delivered, or declares herſelf with child of a baſtard, and will, by oath before a juſtice of peace, charge any perſon as having got her with child, the juſtice muſt cauſe ſuch perſon to be apprehended, and commit him, till he gives ſecurity either to maintain the child, or appear at the next quarter ſeſſions to diſpute or try the fact; when he will either be ſubjected in an aliment or diſcharged, if the juſtices at the ſeſſions, upon hearing all the circumſtances of the caſe, ſhall be of opinion that he is not the father of the child. Chriſtian's Black. B. i, c. 16, p. 458; and Note 10.

§ 3. BASTARDS.

caſe [a]. If the man acknowledge his guilt at a diſta time greater than the natural duration of a woman's nancy, that will not be ſufficient to ſubject him, unleſ proved to have afterwards kept company with her, a an opportunity to repeat his guilt [b].

If he owns guilt.

A burden on the parents.

THE aliment of baſtards is a burden on both paren cording to their reſpective ability. Mr. Erſkine ſays, " *only* the mother, who is always certain, *but likew* " father, if he have either acknowledged the child, o " be preſumed, from other circumſtances, to have be " him [c]." The ſum, therefore, for which decree be given againſt the father, is only ſuch, as togethe the mother's contribution, may ſuffice for the maint of the child. The code of monarchical France mo manely laid the burden on the father alone; and, onl ing him, on the mother. *Lorſque le pere n'eſt pas co lorſqu'il n'a pas le moyen, c'eſt la mere qui doit etre cha l'enfant* [d].

—QUANTUM.

Aliment, diſcretionary, according to expence of living.

As to the *quantum* of the aliment, no particular dire can be given; it muſt be ſuch, as with what the m may be ſuppoſed able to earn with her labour, ſhall be cient for the ſupport and clothing of the child: an muſt depend on circumſtances, according to the expe living in the time and place. The rate of aliment vari according to the father's rank and circumſtances. On material to remark, that be the rank and fortune of the what it may, that is no foundation for the magiſtrate aw ſuch a ſum as ſhall bring up the child in ſuch ſtile as

[a] See ſupra, the chapter on Evidence. Vol. i, p. 234.

[b] The acknowledgment of guilt with the mother, at the diſtance of eleven calendar months from the birth, was not found ſufficient to ſubject the defender. Dict. 1 135.

[c] B. i, t. 6, § 56.

[d] Pothier, Droit Civil, & iii, p. 314.

i Kilkerran reports a caſe, 4l. ſterling of yearly aliment ecerned, to be paid by the to the mother of his baſtard without limiting the endur- A bill of ſuſpenſion was on ound preſented; and as the n occurred upon the paſſing ſing the bill, the lords had lifficulty how to qualify the nce, and at laſt fell upon this ent, to refuſe the bill, with- ejudice to the ſuſpender to again by ſuſpenſion, how ſoon ild ſhould arrive to the age years, and become able to k itſelf; which implied that liment ſhould continue no r than the age of 14, and ſuch he opinion of the court." againſt Kay, 25 July 1740. e ſubſequent caſe, Oliver *ag.* March 1778, " the juſtices of , of the county of Roxburgh, l Oliver, a day labourer, lia- Janet Scott, a woman of the rank, by whom he had a baſ- child, in 4l. ſterling annually liment, for the ſaid child dur- ſhould attain the age of 14 years.

But the court, in reviewing this judgment, were of opinion, that, for perſons in his circumſtances, the ſum was too large, and the time too long; and, therefore, they reſtricted the quantum of the aliment to 3l. in the year, to be paid quarterly, until the child ſhould attain the age of ſeven years; and alſo, thereafter, until either that the father ſhall take the child into his own keeping, or that the child ſhall attain the age of 10 years.

In the caſe of Glendinning againſt Flint, the court found the mother entitled to aliment for the child, ay and until ſhe arrives at the age of 10 years complete, reſerving to the child to apply afterwards for aliment as accords. 19 Nov. 1782. Fac. Coll.

And in the caſe of Paterſon againſt Spiers, 29 Nov. 1782, the lord ordinary found the defender only liable in payment to the purſuer of the aliment awarded, till ſuch time as the child in queſtion arrives at the age of ſeven years. The court adhered to this interlocutor. Obſerved on the

§ 3. BASTARDS —CUSTODY.

till the child is able to do for itſelf. This alimentary claim has been found to fall under the triennial preſcription[o].

Mother entitled during infancy.

THE mother, in general, is the fitteſt perſon to have the charge of the child during the period of infancy[p]. The father has no title to inſiſt for the cuſtody of his natural children; in ſuch caſes, the court of ſeſſion exerciſes a diſcretionary power according to the circumſtances of the caſe. In general, unleſs good cauſe be ſhewn for the contrary, the court allows a daughter to remain with her mother till ſhe arrive at the age of ten years, and a ſon till he arrive at ſeven years.

Daughter.

Son.

A MOTHER, even after her marriage, was preferred to the cuſtody of a child, though the father offered to take him home[q].

--FATHER'S POWER.

THE father has no power over his natural children; he

the continuance of the payment for aliment ſought by the mother, was protracted to 10 years, the child being a female; yet, in the preſent, which reſpects the aliment of a boy, ſeven years appear a more proper period. The lords therefore adhered to the interlocutor of the lord ordinary.—Fac. Coll. The reporter obſerves, that the lord ordinary's interlocutor contained this *ratio decidendi*: "In reſpect from the nature of the "buſineſs carried on by the father, "the defender, being that of bleach-"ing, drying, and dreſſing of cloth, "the child in queſtion will be fit for "being employed in certain branches "of it by the time he arrives at the "age of ſeven years." It is, however, to be remarked, that the court diſapproved of this obſervation as a ground of deciſion; and that, therefore, it had no influence whatever on their judgment.

[o] Dict. Vol. iv, p. 105.

[p] Dr. Burn obſerves, "In practice "it is ſeldom, if ever known, that a "reputed father, who applies to have "the child taken off from the parish "into his own management, even "much as pretends any advantage to "the child thereby, but merely his "own intereſt to ſave charges." Vide Baſtards.

[q] 4th March 1758, Burgeſs against Halliday. And, in a late caſe, where the father pretended anxiety for the morals of the child, and on that account craved to have the cuſtody of the child, mentioning the place where he meant to board it, the court did not indulge him. 11th July 1800, Farquharſon againſt Anderſon.

heir tutor, guardian, nor adminiſtrator, in law [q]. He not ſucceed to them, nor they to him. He is no other- heir father, except in *poenam*, that he may be burdened heir maintenance. § 3. BASTARDS --FATHER'S POWER.

rance, M. Pothier ſays, that baſtards were *ſubſidiarie* the maintaining their parents, failing lawful chil-

ARDS do not ſucceed as heirs at law, nor as neareſt o any perſon; not even to their mother either in les or heritage [s]. And if they die without lawful chil- e king takes up the ſucceſſion as *ultimus hæres*.

ARDS may ſucceed to property heritable or moveable, nation. A baſtard having children may make a teſta- ven in favour of ſtrangers: and though he ſhould lawful iſſue, is abſolute proprietor of his whole and may even ſettle his heritable property by a deed, ake effect till his death [t]. —SUCCESSION. He may gift away. May ſettle heritage by a deed *mortis cauſa*.

our later cuſtoms, contrary to the opinion of Craig,

ſor Chriſtian obſerves, that l, "though he is conſidered *lius* with reſpect to inherit- d ſucceſſions, yet the law ıtice of his connection with ıral parents for ſome other s, as it has been decided, a baſtard marries under r licence, he muſt have the : of his putative father, ın, or mother, according to Geo. II, c. 33." 1 T. R. 96. B. i, p. 458, note 11. He ds adds,—"baſtards are not ıed in equity as legitimate ·en. The court will not ſup- ply the defect of a ſurrender of a copyhold in a conveyance, or deviſe by a father to a natural child, as it will in favour of a legitimate child." Gilb. For. Rom. 256, 2. Veſ. 582. Blackſt. V. i, 459, Note 12.

[r] Droit Civil, &c. Tom. iii, p. 314.

[s] By the civil law, *ſpurii* ſucceeded both to mother and grandmother. L. ii, 4 & 8 ff. *unde cognati*. Juſtinian makes an exception, which Craig ſays is wonderful (*mirum eſt*) that ſpurious children did not ſucceed to their mother if ſhe was *illuſtris*. L. v, AD SC. Orphitianum.

[t] Erſk. Inſt. P. iii, t. 10, § 6.

§ 3. BASTARDS —SUCCESSION.

have adopted the doctrine of ſome other ſtates, that baſtar having no lawful children, are incapable of making a te ment [b].

§ 4. LEGITIMATED CHILDREN.

IV. THE ſovereign, the fountain of honour, can remove ſtain of baſtardy by letters of legitimation; which enable baſtard to make a teſtament, and even to aſſume the na and arms of his putative father's family, (only marked w a croſs barr) [c]: letters of legitimation, however, do not m his property as in right of blood, deſcendible to his agnat that is, his relations by the father [d], unleſs they contain expreſs clauſe to that effect. But they never entitle hi as in right of blood, to ſucceed to any perſon; becauſe t would interfere with the rights of third parties.

[b] Erſk. ib.

[c] Children legitimated by ſubſequent marriage being, to all intents, lawful children, bear their father's arms without any ſuch diminution.

"I cannot," ſays ſir George Mackenzie, "be ſo partial here as not to "reprove an error of my own countrymen, who make the mark of "baſtardy to be a ribbon ſable, and "make it extend from the dexter "corner of the ſhield to the ſiniſter; "for the mark of baſtardy ſhould "ſtill be ſiniſter: nor is it called a "ribbon in any nation.

"And though we have received "an opinion, that the baſtard's diſ-"tinction may be, after three "erations, born dexter or omit "yet the opinion is moſt un "rantable, for *jura* ſanguinis n "quam præſcribuntur. And, "the baſtards of great families "were very dangerous, for the "tards might pretend to the ſu "ſion by this means; albeit "mark was invented to end "them." Works, fol. edit. V. 5

[d] Ad. Hunter againſt Alex. S ter, baſtard; 10th Feb. 1784, Coll. Letters of legitimation do entitle agnates to ſucceed to a baſt without a ſpecial proviſion in t favour.

CHAP. X.

Of Perſons under Age.

A CHILD is under pupillarity, if a male, till fourteen; and if a female, till twelve years of age. Minority ins where pupillarity ends, and continues till majority, t is, the age of twenty-one years complete. § 1. PUPILLARITY. Male. Female.

PUPILS cannot in any degree act for themſelves. They are tected from impriſonment on civil debts[a]. But if pupils guilty of thieving, or other crime or miſdemeanour, y are liable to be puniſhed as the circumſtances of the e and their knowledge of the criminality of the act may m to require. In caſes of peculiar aggravation, their lt may perhaps even be ſuch as to be capitally puniſh- [b]. Pupils.

THE father has the right of naming tutors: if he name e, the neareſt relation by the father's ſide is entitled to Tutors named by the father.

[a] Act 1696, c. 41.

[b] Vol. i, c. 1.

§ 1. PUPILS.

act as tutor-in-law, the perſon of the child being entruſt to the mother till it attain the age of ſeven, if ſhe rema

Cuſtody of his perſon.

unmarried, and failing her to the next cognate, i. e. relati by the mother.

Factor, *loco tutoris.*

IF no tutor at law demand the office of tutor, a ſtrang may apply to the barons of exchequer for a tutory dativ or the court of ſeſſion may, upon the application of any kin

Tutory dative.

man, and under certain regulations, appoint a factor *loco tu toris* for the management of the pupil's eſtate.

Inventory.

TUTORS muſt make up an inventory. The office of a fe male tutory falls by her marriage. A tutor cannot act wher he has a perſonal intereſt: he cannot be *auctor in rem ſuam* A larger ſum than the intereſt of the pupil's ſtock, or th rent of his eſtate, ſhould not be employed for his educatio and maintenance.

§ 2. MINORS.

II. MINORITY begins where pupillarity ends, and con tinues till twenty-one years of age, when both boys an girls become major.

THE father cannot on death-bed name curators to h children. Even in *liege poujie*, he cannot name them to h grandchildren, nor to his foriſfamiliated children.

Father, if curator.

THE father, if alive, is curator as well as tutor, that i adminiſtrator in law, to his children. Otherwiſe, the min chooſes curators to himſelf.

May they encroach on the ſtock?

CURATORS may encroach upon the ſtock, for giving th young man neceſſary education, or putting him into a w of buſineſs.

Reſtitutio.

MINORS, not having curators, may be reſtored againſt deeds that are hurtful to them, granted by them in their m

nority, if challenged within four years after majority. If a minor, having curators, act without their advice, the deed is null. § 2. MINORS.

MINOR non tenetur placitare ſuper hereditate paterna; that is, to appear as defender in any proceſs whereby his heritable property, derived from the father, may be evicted.

A MINOR's perſon may be laid hold of for civil debts due by him. If he has tutors or curators, he cannot ſue or be ſued without them. Minors committing delicts or other offences are puniſhable.

III. INTERDICTION is a legal reſtraint laid on facile and extravagant perſons, from ſigning any deed to their own prejudice without the conſent of their interdictors. Though interdictions be voluntary, they cannot be recalled by the party at his pleaſure. § 3. INTERDICTED PERSONS.

CHAP. XI.

Of Watching and Warding.

I. WATCHING AND WARDING.

I. A POLICE magiſtracy would be of little avail w out the power and the means of coercion. mode of exerciſing ſuch power has already come under view when conſidering preventive, remedial, and puniſh juſtice. Here it is meant to take notice, in general, of legal proviſions for having places of confinement, and of o general regulations reſpecting impriſonment.

§ 2. WHO ARE LIABLE.

II. " BUROUGHS having great freedoms and privil " from the king, are therefore obliged to have ſuffic " priſons for receiving ſuch as are attached for crimes " debts [a]." This burden naturally aroſe from the an ſervice of watching and warding, the price of their privil and immunities [b]. It is further enforced by poſitive

[a] Sir George M'Kenzie's Obſervations, p. 302.

[b] Servitia autem burgorum hæc ſunt; vigiliæ, cuſtodiæ intra burgum et ejus territorium (nos liber burgi dicimus.) Craig, Lib. i. 10, § 31. And the 86th chap the Leges Burgorum relates en

tute[c]. The general ſtatute impoſed no new burden upon burghs, when it ordained that "all magiſtrates of burghs, and "keepers of any gaols or priſons, ſhall receive into their "priſons all ſuch perſons as either ſhall be brought by con- "ſtables, or ſent unto them by warrants under the hand of "any one juſtice of peace, the ſaid juſtices cauſing ſatisfie "for their entertainment[d]." §2. WHO ARE LIABLE.

BOROUGHS of barony are not bound to have priſons; "but "the baillies of the head burghs of ſtewartries were thought "to be obliged by this act of parliament to receive pri- "ſoners[e]." And a borough of barony, having a ſufficient Boroughs of barony.

to watching within burgh, as follows: "Forth of ilk houſe inhabit, ane "man ſould come to watch for feare "of perrell, quha ſall paſſe fra dure "to dure, with ane ſtaff in his hand, "and ſall be of ane man's age. And "quhen curfure (coverfew) is rung "in, he ſall come forth with twa "wapons, and ſall watch cairfullie "and diſcrietlie untill the morning. "And gif he faile therein, he ſall "pay ane unlaw of foure pennies."

[c] The ſtatute James VI, parl. 15, c. 177, 1597, narrates, "that, for "want of ſufficient and ſure pri- "ſones, jailles, and warde houſes, "ſundry rebelles and trangreſſoures "of the laws, alſweill criminal as "civil, eſcapis unpuniſhed, and juſ- "tice contemned;" and ordained, "that within the ſpace of three "ſeines, in all burghs within this "realme, there be ſufficient and ſure jailles and warde houſes bigged, upbalden and mainteined by the ſaid provoſt, baillies, councell, and communities of the ſaid burghs, "upon their awin commoun gude, "or otherways upon the charges of "the burgh. And that, for ſure "impriſoning, warding, keeping, and "deteining of all ſik perſons, tranſ- "greſſoures of his heineſs lawes, "upon their awin expences, alſweill "criminal as civil, as ſall be preſent- "ed unto them be the ſchireffe of "the ſchire, or ſtewards and baillies "of regalities within the quhilk the "ſaids burghes are ſituate, and ſpe- "cially quhair their judicatory ſits. "And alſwa all uther perſons pre- "ſented aither to warde be vertew "of their awin authority within "burghs, or utherwayes upon let- "ters of caption directed to them.

[d] 1661, c. 38, App. 1, p. 56.

[e] M'Kenzie, ibid. Sir George refers to the caſe Cheap againſt Baillies of Falkland, June 18, 1670.

But lord Stair, who reports the caſe, obſerves, "The lords did not "determine that point".....They "found, that ſeeing the defenders "did receive the rebel upon the

§ 2. WHO ARE LIABLE. gaol, is bound, at its own expence, to maintain priſoners in it for crimes committed within the borough; but it is entitled to relief from the rogue-money, for the maintenance of perſons confined for crimes committed in the other parts of the county [f].

§ 3. MAINTENANCE OF PRISONERS. III. THE ſtatute expreſsly ſays, that the priſoners are to be kept upon "their awin expences." But in general they are unable to maintain themſelves: wherefore, in the caſe of perſons criminally convicted, the ſtatute ordains "commiſſioners and juſtices, at their quarter ſeſſions, to "rate every paroch for a weekly proportion, for the entertainment of thoſe poor priſoners, providing they do not "exceed the ſum of five ſhillings Scots money at the most "nor under one ſhilling at the leaſt; which ſum ſhall be "uplifted for that uſe by the miniſter or reader, who ſhall "ſerve at every paroch, from ſuch deacons who ſhall be "appointed to collect the ſame, and the ſaid ſums to be "delivered by the conſtable of the paroch at the quarter "ſeſſions, in preſence of the whole bench then convened, "to ſuch perſons as the ſaid juſtices ſhall truſt therewith, "and who accordingly ſhall make due account in paying "the gaolers ſuch rates as ſhall be allowed for the poor "priſoners, and making the reſt forthcoming for ſuch uſes as "intent of the like nature, as the ſaid juſtices ſhall appoint."

THIS branch of police was afterwards regulated by a clau

"caption, they could not now diſpute "whether they were liable to receive "or not, as being the head burgh of "the ſtewartrie, and therefore," &c.

[f] 17th January 1793, Magiſtrates of Paiſley againſt the Freeholders and Commiſſioners of Supply of the county of Renfrew. Fac. Coll. The reporter adds, "the court however "were influenced a good deal by "practice," i. e. the practice of the burgh. For he adds in a note, from inquiries with reſpect to the mode in other burghs of barony, "it appears that the uſage had not been uniform, nor ſettled on any general ſyſtem."

[g] App. of Statutes, p. lvi.

of the general ſtatute of Geo. I, for ſecuring the peace of the country, empowering the freeholders to levy an aſſeſſment, which is commonly called the rogue-money fund [a]. Theſe proviſions do not extend to debtors, who muſt be maintained, either on their own funds, or at the expence of the perſon by whom they are impriſoned [b].

§ 3. 11 Geo. I, c. 25, § 12. —ROGUE MONEY.

IV. THE juſtices of peace are particularly enjoined to "take notice, in all ſheriffdoms, where there are any gaols "and priſon houſes within any burgh, that the ſame may "be kept up, and not ſuffered to decay or become ruinous; "and if there be any ſhire where there is not any gaol or "priſon houſe, they ſhall inform his majeſty's council there-"of, that they may appoint and give order for building of "one within the head burgh of the ſhire; and, according "to the directions to be given thereanent, the juſtices ſhall "be holden to proceed."

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11 Geo. I, c. 25, § 12. "And "whereas, for want of a ſufficient "fund for defraying the charges of "apprehending criminals in North "Britain, and of ſubſiſting them "when apprehended, until proſecu-"tion, and of carrying on the neceſ-"ſary proſecutions againſt them, it "often happens that criminals there-"by eſcape the puniſhment due to "their offences; for preventing of "which inconvenience for the fu-"ture, be it enacted, by the author-"ity aforeſaid, that it ſhall and may "be lawful to and for the free-"holders of every ſhire, county or "diſtrict in North Britain, to aſſeſs "the ſeveral ſhires or ſtewartries, "where their eſtates lie, at their "meetings, at any of the head courts, "yearly, in ſuch ſums as they ſhall "judge reaſonable and ſufficient for "the purpoſes aforeſaid; and that "ſuch monies ſo, from time to time, "to be aſſeſſed, ſhall be collected, "received, and accounted for, by "ſuch perſon and perſons and in "ſuch manner as ſuch freeholders "ſhall from time to time appoint, "and ſhall be applied for defraying "the charges of apprehending of "criminals, and of ſubſiſting of them "in priſon until proſecution, and of "proſecuting ſuch criminals for their "ſeveral offences by due courſe of "law, and to and for no other uſe "or purpoſe whatſoever."

b It is not by this meant, that either debtor or creditor is chargeable with any dues for lodging or room rent in priſon; unleſs it ſhall be thought proper, at the priſoner's deſire, to accommodate him with a better apartment than the common rooms for debtors.

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THERE are alſo ſome Britiſh ſtatutes, which muſt be ſuppoſed applicable to the Scottiſh as well as Engliſh juſtices, ſo far as they are capable of being executed with us, conſiſtently with our own rules and regulations. Thus, *1ſt*, with reſpect to the building and repairing of gaols[h]; *2dly*, there

[h] The juſtices, or the greater number of them, within the limits of their commiſſion, upon preſentment of the grand jury at the aſſizes (or ſeſſions, 12 Geo. II, c. 29, § 13,) of the inſufficiency or inconveniency of the county gaol, may contract with any perſon for the building, finiſhing, or repairing the ſame. 11 and 12 Will. c. 19, § 1, 2. The expence thereof to be paid by the treaſurer, out of the general county rate. 12 Geo. II, § 29.

But this ſhall not extend to gaols held by inheritance; nor to charge any perſons in any town or liberty which have common gaols for felons, and commiſſioners of aſſize or gaol delivery, for any aſſeſſment to the making the common gaol for the ſhire. 11 and 12 Will. c. 19, § 4, 5.

By the 24 Geo. III, c. 54, ſeſſ. 2, the juſtices at their general quarter ſeſſions, or the major part of them, ſuch major part not being leſs than ſeven, upon preſentment made by the grand jury at the aſſizes, of the inſufficiency, inconveniency, or want of repair of the gaol, may contract for the building, repairing, or enlarging the ſame, and the yards, courts, and outlets thereof, and adding ſuch other buildings, and making ſuch conveniences, as ſhall be adjudged requiſite; or for erecting any new gaol upon any ſite or ground within any diſtance not exceeding two miles from the ſite of the old gaol, and in that caſe for the ſelling the old gaol, and the ſite thereof, and land thereunto belonging, or any part thereof, and alſo the materials of the old gaol; the contractors giving ſecurity to the clerk of the peace for performance of the contract. § 1.

And the ſaid juſtices after ſuch preſentment made, ſhall, at the next ſeſſions, cauſe notice to be given three times at leaſt, in ſome public paper circulating near the place, of ſuch preſentment having been made, and of their intention to take the ſame into conſideration at the next enſuing or ſome following ſeſſions; and after ſuch conſideration thereof, they ſhall give notice in ſuch paper of their intention of contracting as aforeſaid: And all contracts then made, and orders relating thereto, ſhall be entered in a book by the clerk of the peace, and kept by him to be inſpected by the ſaid juſtices, or any other perſon contributing to the rates of the county, without fee. § 2.

And the ſaid juſtices may build any new gaol in any part of the county, in caſe (in the preſentment made of the inconvenience of the old gaol) it be expreſsly preſented, that the place wherein the old gaol is ſituate, is improper, and that the ſaid gaol ought to be removed to ſome other part of the county; and in caſe three fourths in number of the juſtices aſſembled, at two ſucceſſive quarter ſeſſions (notice having been

nuce or the ground, as in
ing upon the plans, purſue
ſures as ſhall provide ſepar-
diſtinct places of confine-
ith dry and airy cells, in
e ſeveral priſoners of the
; deſcriptions reſpectively
confined, as well by day as
; namely, priſoners convict-
ny, priſoners committed for,
ged to be guilty of, miſ-
urs only, and debtors: The
each claſs to be ſeparated
e females; and a ſeparate
confinement to be provided
priſoners as are intended to
ined as witneſſes on behalf
roſecution of any indictment
y. And alſo ſeparate infirm-
ſick wards, for the men and
omen: And alſo a chapel:
venient warm and cold baths
and other things as directed
ea. III, c. 59, and care to be
at priſoners ſhall not be kept
apartment under ground.

the ſaid juſtices (after pre-
t made as aforeſaid) may
: any houſes or lands, for
, enlarging, and accommo-
ach gaols, and to direct the
ſum, in any contract or agreement to be made under the authority of this act; or ſhall for any deſign or plan he may deliver or produce, receive any benefit or emolument whatſoever. § 19.

The juſtices in ſeſſions may appoint one or more juſtices to viſit and ſuperintend the gaols, and make report of the ſtate thereof to the court, who may, upon ſuch report, order any ſum not exceeding 200l. in any one year, to be laid out upon the repairs thereof, notwithſtanding ſuch want of repair ſhall not have been preſented by the grand jury. And if it ſhall happen that the gaol, by any breach being made in the ſame, from attempts of priſoners to eſcape, or other caſualties or accidents, ſhall be rendered unſafe for the cuſtody of the priſoners therein confined, between the ſeveral times of holding the ſeſſions, one or more juſtice may order the damage occaſioned thereby to be immediately ſo far repaired as may be ſufficient for the ſafe cuſtody of the priſoners, and upon report thereof to the ſeſſions, they may order payment for the ſame. § 7.

When the juſtices ſhall think it neceſſary that the priſoners ſhall be

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ment, as the ſaid juſtices, with the conſent of ſuch ſheriff, ſhall approve of: And the expence of ſuch removal, and the expence which may be incurred by the ſheriff on account of the ſafe cuſtody of ſuch priſoners, ſhall be paid out of the county rate, and ſuch removal as aforeſaid ſhall not be deemed or taken to be an eſcape. But this ſhall not extend to diſcharge any ſheriff or gaoler for being anſwerable for the actual eſcape of any priſoner in his cuſtody. § 6.

And whereas there are ſeveral perſons confined in county and city gaols under ſentences and orders made by one or more juſtices at their ſeſſions, or otherwiſe, upon convictions in a ſummary way, without the intervention of a jury; it is enacted, that any judge of aſſize, or two juſtices of the peace within whoſe juriſdiction ſuch gaol is ſituate, may remove ſuch perſons to any houſe of correction within the ſame juriſdiction, there to be confined, and to remain in execution of ſuch ſentence or order. 24 Geo. III, c. 56, ſeſſ. 2, § 12.

And the expence of building, rebuilding, repairing, or enlarging ſuch gaols, and ſuch other neceſſary expences as aforeſaid, ſhall be paid out of the county rate; and when the amount thereof ſhall exceed one half of the amount of the ordinary annual aſſeſſment for the county rate, (to be computed at a medium for the laſt five years preceding), the juſtices in ſeſſions may borrow on mortgage of the ſaid rates, any ſum not leſs than 50l. nor more than 100l. and may order the intereſt due thereon, and ſo much of the principal ſum as ſhall be equal at leaſt to the ſaid intereſt, to be paid off yearly, until the whole thereof ſhall be diſcharged, and account thereof ſhall be kept in book to be provided for that purp which book ſhall be delivered i court at every quarter ſeſſions, ſ ſhall be inſpected by the juſti who ſhall make ſuch orders relati thereto as to them ſhall ſeem me Provided that the whole money b rowed be fully paid within fourt years from the time of borrow the ſame. 24 Geo. III, c. 54, ſeſſ § 8, 9, 10, 11.

And if any perſon intereſted any houſes of lands which ſhall deemed neceſſary for the building enlarging ſuch gaols, ſhall upon tice in writing being given to th or left at their uſual place of ab refuſe to treat, or accept the p that ſhall be offered for the ſame, twenty-one days next after ſuch tice; the juſtices in ſeſſions ſhall der the value thereof to be aſcert ed by a jury; who may examine neſſes upon oath, (to be adminiſte by a juſtice), and the verdict of t jury ſhall be filed at the ſeſſions, ſhall be final and concluſive aga all perſons whatſoever. § 14.

And by 31 Geo. III, c. 46, rules, orders, and regulations for ſeparation and claſſing of priſon and the ſecuri g juſt and hum treatment by gaolers, directed by Geo. III, c. 54, and all other di tions contained in the ſaid act, ſ be exactly conformed to. § 6.

And by 29 Geo. III, c. 67, ev gaoler ſhall at the Michaelmas ſions yearly, deliver a certificate ſigned and verified on oath, ei before ſuch court, or in caſe of ſ neſs, inability, or other cauſe, unable to attend then before a

hich certificate ſhall expreſs
ch of the proviſions therein
ted, whether ſuch proviſion
ot complied with or obſerv-
n ſuch gaol; and ſuch certi-
ll be read publicly in open
the preſence of the grand
l entered on the records of
n. § 1.

ch ſeſſions ſhall thereupon
ſaid certificate into their
tion, and may ſummon any
med therein to appear be-
; and ſhall give ſuch direc-
l make ſuch orders relating
s to them ſhall ſeem meet;
take ſecurity from any per-
rned for his due perform-
.

very gaoler, who ſhall ne-
deliver ſuch certificate, be-
ny gaoler, ſhall forfeit 50l.;
county gaoler, 20l. to be
in the courts at Weſtmin-
.

Form of the certificate.

he general quarter ſeſſions
peace for the ſaid
at this day
in the year of our Lord
the certificate of
nance of the ſtatute in this
ide and provided, reſpecting
d of ."

l 23 Car. II, c. 20, enacts,
s and debtors ſhall be kept
under penalties upon the
gaoler.

ıll, c. 40, enacts, that
ler ſhall ſell, lend, uſe, give
, or ſuffer ſpirituous liquors
in any gaol, under a penal-

2. Copy of the clauſe laſt mentioned, as alſo of two other clauſes reſpecting the ſame, ſhall be hung up in the gaol, under a penalty.

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32 Geo. III, c. 28, enacts, that

The clerk of the peace ſhall cauſe a liſt of the fees payable by debtors, and the rules and orders for the government of gaols and priſons, to be hung up in the court where the aſſizes or ſeſſions ſhall be held, and ſend another copy to the gaoler; and the gaoler ſhall cauſe the ſame to be hung up in a conſpicuous place in the ſaid gaol.

13 Geo. III, c. 58, enacts, that

Clergymen may be provided to officiate in gaols.

14 Geo. III, c. 20, enacts, that

Perſons acquitted, or diſcharged upon proclamation for want of proſecution, ſhall be diſcharged immediately, in open court, and without fee.

14 Geo. III, c. 59, enacts, that

1. The walls and ceilings of cells in gaols ſhall be ſcraped and whitewaſhed once in the year at leaſt.
2. That the cells ſhall be kept clean; and
3. That they ſhall be ſupplied with freſh air, by ventilators or otherwiſe.
4. That there ſhall be two rooms ſet apart for the ſick.
5. That a warm and cold bath, or bathing tubs, ſhall be provided.
6. That this act ſhall be hung up in the gaol.
7. That a ſurgeon, or apothecary, ſhall be appointed with a ſalary.

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are ſeveral ſalutary regulations as to the ſelling of ale, wi
or other ſtrong liquors, in gaols[1]; 3*dly*, there are pro

[1] By the 24 Geo. II, c. 40, no licence ſhall be granted for retailing ſpirituous liquors within any gaol or priſon; and if the gaoler ſhall ſell, lend, uſe, or give away, or ſuffer the ſame, (except by way of medicine), he ſhall forfeit 100l. half to the king, and half with full coſts to him who ſhall ſue. § 17.

And any juſtice on information on oath, that ſpirituous liquors are kept or diſpoſed of in ſuch gaol, may enter and ſearch, or iſſue his warrant to ſearch for, and ſeize, and ſtave, and deſtroy the ſame. § 18.

And if any perſon ſhall endeavour to bring any ſpirituous liquors into ſuch gaol, the gaoler or his ſervants may apprehend and carry him before a juſtice; and if by the oath of one witneſs or otherwiſe ſuch perſon ſhall be convicted, he ſhall be committed to priſon or to the houſe of correction, not exceeding three months, unleſs he ſhall immediately pay down ſuch fine, not exceeding 20l. and not leſs than 10l. as the juſtice ſhall impoſe, to be paid, half to the informer, and half to the poor of ſuch gaol. § 19.

And a copy of the three clauſes above, ſhall be hung up in each gaol, on pain of the gaoler forfeiting 40s. to be levied by warrant of one juſtice, on conviction on the oath of one witneſs: And any juſtice may enter and demand a ſight of ſuch copy, and if not ſhewn to him, he ſhall immediately convict ſuch gaoler: one half of the ſaid penalty to be to the informer, and the other (or the whole if there be no informer) to the of ſuch gaol. § 20.

And by the 24 Geo. III, c. 54, no gaoler nor any perſon in trus him, or employed by him, ſhall tippling or gaming in ſuch pri nor ſhall ſell, or permit to be ſol be capable of being licenſed to any wine, ale, or other liquors have any beneficial intereſt or cern whatſoever in the ſale or poſal of any liquors of any kinds in any tap-houſe, tap-room, or on pain of forfeiting 10l. for e ſuch offence; to be recovered by treſs, by warrant of two juſtices on confeſſion of the party, or t the information on oath of one neſs, which penalty ſhall be d buted half to the informer, and to the priſoners confined in gaol; and for want of ſufficient treſs, the offender to be comm to the houſe of correction for time not exceeding three mo unleſs ſuch penalty with reaſo charges ſhall be ſooner paid. §

And the conviction may be in following form, or to the like fect:—

" Be it remembered, that on
" of in the
" year of the reign of his maj
" A. O. is convicted
" fore of his majeſty'
" tices of the peace for the ſaid
" ty, [or riding, diviſion, city,
" liberty, or precinct, as the caſ
" be,] by virtue of an act of p
" ment made in the 24th year
" reign of his majeſty king G

ſions as to the ſetting of the priſoners at work [k]; 4*thly*, great care is employed for attaining the important object of cleanlineſs [l]; 5*thly*, in order to ſecure thoſe objects, the

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[a] the third, intitled [here ſet forth [b] the title of the act, and offence, [c] and the time when, and place where, [d] committed.]

[e] Given," &c. § 23.

And the ſaid juſtices in their ſeſſions, or at any ſpecial adjournment thereof held for ſuch expreſs purpoſe, may, if it ſhall appear to them neceſſary or proper, appoint ſalaries or allowances to gaolers, in lieu of the profits which were before derived from the ſale of liquors, as to them ſhall ſeem meet, and order the ſame to be paid out of the county rate, by a certificate of ſuch allowance being ſigned by the chairman of the ſeſſions: But no chairman ſhall ſign ſuch certificate, unleſs notice of ſuch intended application, ſigned by the clerk of the peace, hath been given 14 days at leaſt before the holding of ſuch ſeſſions or adjournment thereof, by two ſeveral advertiſements in ſome newſpaper printed and circulated in ſuch county. § 20, 21.

[k] The juſtices in their general ſeſſions, if they find it needful, may provide a ſtock of ſuch materials as they find convenient for the ſetting poor priſoners on work, to be paid for by the treaſurer out of the general county rate: and may pay and provide fit perſons to overſee and ſet ſuch priſoners to work; and make ſuch orders for accounts concerning the premiſes, as ſhall be thought needful, and for puniſhment of neglect and other abuſes, and for beſtowing the profits ariſing by the labour of the priſoners for their relief. Provided that the ſum to be ſo paid do not exceed the rate of 6d. a week for any one pariſh. 19 Car. II, c. 4, § 1. 12 Geo. II, c. 29.

And by 31 Geo. III, c. 46, after reciting, that it is fit the proviſions in the ſaid act 19 Car. II, c. 4, ſhould be executed, and that the ſame ſhould alſo be extended to all priſoners inclined to take the benefit thereof, or who are inclined and willing to work; and alſo to increaſe the ſum therein limited for defraying the expences of executing the ſame: It is enacted, that the juſtices in ſeſſions may direct the payment of ſuch ſums of money out of the county rate as they ſhall think fit in executing the proviſions of the ſaid act according to the extenſion thereof hereby made. § 22.

[l] But foraſmuch as the gaol is intended, in moſt caſes, for cuſtody and not for puniſhment; and confinement itſelf in ſuch diſmal abodes is ſufficiently afflictive and diſconſolate; human nature will plead for thoſe miſerable objects, that their condition be rendered as tolerable as the caſe will admit of; particularly with regard to cleanlineſs, which is the parent of health; and wholeſome air, which is life itſelf. In conformity with theſe humane ſentiments, the following regulations were eſtabliſhed by the 14 Geo. III, c. 59.—

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Whereas the malignant fever, commonly called the gaol diſtemper, is found to be owing to want of cleanlineſs and freſh air in the ſeveral gaols, the fatal conſequences whereof might be prevented, if the juſtices of the peace were duly authorized to provide ſuch accommodations in gaols, as may be neceſſary to anſwer this ſalutary purpoſe; it is therefore enacted, that the juſtices, in their ſeveral quarter ſeſſions, ſhall order the walls and ceilings of the ſeveral cells and wards, both of the debtors and felons, and alſo of any other rooms uſed by the priſoners in their reſpective gaols where felons are uſually confined, to be ſcraped and whitewaſhed once in the year at leaſt; and to be regularly waſhed and kept clean, and conſtantly ſupplied with freſh air by hand ventilators or otherwiſe: and ſhall order two rooms in each gaol, one for the men, and the other for the women, to be ſet apart for the ſick priſoners, directing them to be removed into ſuch rooms as ſoon as they ſhall be ſeized with any diſorder, and kept ſeparate from thoſe who ſhall be in health; and ſhall order a warm and cold bath, or commodious bathing tubs, to be provided in each gaol, and direct the priſoners to be waſhed in ſuch warm or cold baths or bathing tubs, according to the condition in which they ſhall be at the time, before they are ſuffered to go out of the gaol upon any occaſion whatſoever. And they ſhall order this act to be printed in large and legible characters upon a board, and hung up in ſome conſpicuous part of the gaol. And they ſhall alſo appoint an experienced ſurgeon or apothecary, at a ſtated ſalary, to attend the gaol; who ſhall report to the juſtices, at each quarter ſeſſions, a ſtate of the health of the priſoners under his care. § 1.

And they ſhall have power, in the ſaid quarter ſeſſions, to order cloaths to be provided for the priſoners when they ſee occaſion; and to prevent the priſoners from being kept under ground, whenever they can do it conveniently; and to make ſuch other orders, from time to time, for reſtoring or preſerving the health of priſoners, as they ſhall think neceſſary: and alſo to direct the ſeveral courts of juſtice within their reſpective juriſdictions to be properly ventilated. § 2.

And the expences attending the execution hereof, ſo far as the ſame ſhall reſpect county gaols and courts of juſtice belonging to counties ſhall be paid out of the county rates; and ſo far as they reſpect the gaols and courts of juſtice of particular cities, franchiſes, or places, that do not contribute to the county rate ſhall be paid out of the public ſtock of ſuch city, franchiſe, or place. § 3.

And if the gaoler ſhall neglect or diſobey the orders of the juſtices, he may be proceeded againſt in a ſummary way, by complaint to the judges of aſſize, or to the juſtices at their quarter ſeſſions; and if he be found guilty, he ſhall pay ſuch fine as they ſhall impoſe, and be committed in caſe of non-payment. Id. [It is not ſpecified to what place, nor for what time.]

juſtices are directed to viſit the gaols[m]; *6thly*, as a farther

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[m] And by 31 Geo. III, c. 46. For the better preventing abuſes in gaols, the juſtices ſhall at every ſeſſions after the paſſing of this act, appoint two or more juſtices viſitors of every ſuch gaol, who ſhall, either together or ſingly, perſonally viſit and inſpect ſuch gaol at leaſt three times in each quarter of a year, and oftner if occaſion ſhall require; and ſhall examine into the ſtate of the buildings, the behaviour and conduct of the officers, and the treatment and condition of the priſoners, and the amount of their earnings, and the expences attending ſuch priſon; and in matters of preſſing neceſſity, and within the powers of their commiſſion as juſtices, ſhall take cognizance thereon, and proceed to regulate and redreſs the ſame; and at every ſeſſions, the ſaid viſiting juſtices reſpectively, ſhall make a report in writing of the ſtate and condition thereof, and of all abuſes which may occur to their obſervation therein; and the chairman of ſuch ſeſſions ſhall call upon the ſaid viſitors for ſuch report. And any juſtice of his own accord, and without being appointed a viſitor, may enter into and examine the ſame at ſuch time and as often as he ſhall think fit, and if he ſhall diſcover any abuſe therein, he ſhall report the ſame in writing to the next ſeſſions or adjournment; and when any abuſes ſhall be reported in manner aforeſaid, the ſame ſhall be taken into immediate conſideration, and ſuch effectual meaſures ſhall be adopted for enquiring into and rectifying the ſame, as ſoon as the nature of the caſe will allow. § 5.

And if ſuch viſitors ſhall obſerve, or be ſatisfactorily informed of any extraordinary diligence or merit in any offender, they ſhall report the ſame to the judges at the next aſſizes, who may if they think proper recommend ſuch offender to the royal mercy, and if his majeſty ſhall ſhorten the time of confinement of ſuch offender, he ſhall, together with neceſſary clothing, receive ſuch ſum for his immediate ſubſiſtence, as the ſaid viſiting juſtices ſhall think proper, not exceeding 20s. nor leſs than 5s. in caſe he hath been confined for one year, and ſo in proportion for any ſhorter term; ſuch money, as alſo the expence of ſuch clothing, ſhall be paid out of the county rate. § 14.

And whereas a conſiderable part of the emoluments of gaolers, has uſually ariſen from fees paid by debtors and other priſoners and from incidental charges made on the county rate, on the diſmiſſion of priſoners, and on the removal of tranſports: and by neglects in regulating the ſaid fees as directed by the 32 Geo. II, c. 28, they are become oppreſſive to poor priſoners, and ſuch charges on the county rate are liable to frequent abuſes; it is enacted, that the juſtices in ſeſſions or ſpecial adjournment thereof, ſhall within 12 months after the paſſing of this act, regulate and ſettle a table of fees and rates to be taken by gaolers; and the ſaid juſtices ſo aſſembled, may from time to

§ 4. PRECAUTIONS FOR KEEPING THEM IN CONDITION.

time, alter, vary, or totally diſallow of all or any ſuch charges and fees; and ſhall order a copy thereof ſo regulated to be hung up in the court of aſſize and quarter ſeſſions, and another copy thereof to be ſent to the gaoler, who ſhall cauſe the ſame to be hung up in ſome conſpicuous place within the gaol; and all orders and directions contained in the ſaid act of 32 Geo. II, reſpecting the table of fees to be taken by gaolers, ſhall be conformed to as if the ſame were herein particularly enacted and repeated. § 15.

And by way of recompence for any diminution of emolument in the office of gaoler by means of any ſuch regulation of fees, or by the diſallowing any ſuch charges on the county rate, or in lieu of the profits and emoluments that have uſually ariſen from the office of gaoler; the ſaid juſtices ſo aſſembled, may grant ſuch ſalaries and allowances to ſuch gaoler and his aſſiſtants as to them ſhall ſeem reaſonable; and from time to time may alter and vary the ſame as they ſhall think fit, which ſhall be paid out of the county rate, upon an order ſigned by the chairman of ſuch ſeſſions, ſpecifying ſuch ſalary and allowance: Provided always, that no ſuch regulation which may in any wiſe affect the ſheriff or his officers, ſhall have effect pending the continuance in office of the ſheriff who ſhall be actually in commiſſion at the time of making ſuch regulation, unleſs he ſhall, by writing under his hand, conſent thereto; and ſuch juſtices in granting to any gaoler any ſuch ſalary or allowance, may ſtipulate as a condition of the payment thereof, that he do regularly obſerve and keep the rules and orders of the gaol. Id.

But no ſuch ſalary and allowance ſhall be paid out of ſuch county rate to any woman, or other perſon incapable of executing the office in perſon, who may at any time be appointed a gaoler. Id.

All fines, forfeitures, and penalties inflicted by this act, the recovery and application whereof is not particularly herein directed, ſhall be levied by diſtreſs by two juſtices, who may hear and determine the ſame; and when recovered, ſhall be paid to the treaſurer of the county or diviſion, and applied to the purpoſes of this act. And for want of ſufficient diſtreſs, the offender ſhall be committed to priſon for any time not exceeding three nor leſs than one calendar month, as ſuch juſtices ſhall think proper. § 16.

And the conviction may be in the following form:

" Be it remembered, that on
" in the year of our lord
" A. C. is convicted before me J. S.
" one of his majeſty's juſtices of the
" peace for the county of
" [here ſet forth the offence.] Given
&c. § 17.

If any perſon ſhall think himſelf aggrieved (where no particular method of relief is appointed) he may appeal to the ſeſſions, within four calendar months after the cauſe of complaint ſhall have ariſen, firſt giving ſeven clear days notice at leaſt in writing of his intention to appeal and the matter thereof, to the juſti-

deck, gaolers are induced to make returns [n]; *7thly*, provision is also made for the attendance of a clergyman [o]; and *lastly*, for the mode of setting prisoners at liberty [p]. § 4. PRECAUTIONS FOR KEEPING THEM IN CONDITION.

justices who convicted him, and to the clerk of the peace; and within two days after such notice, he shall enter into recognizance before some justice, with two sureties to try such appeal, and to abide the order of, and pay such costs as shall be awarded at such sessions; who, upon due proof of such notice having been given, and recognizance entered into, as aforesaid, shall hear and finally determine such appeal in a summary way, and award such costs to either party as they shall think proper, which determination shall be final to all intents and purposes. § 18.

And no proceedings herein or touching such conviction shall be quashed for want of form, or removed by *certiorari*. And no distress shall be deemed unlawful, nor the party making the same deemed a trespasser on account of any defect in the proceedings, nor shall such party be deemed a trespasser *ab initio* on account of any irregularity which may be afterwards done by the party distraining, but the person aggrieved may recover special damages in an action on the case. But no plaintiff shall recover, if tender of sufficient amends hath been made, before such action brought. § 19.

[n] And the keeper of every gaol, shall the first day of every assizes make a return in writing to the clerk of assize or other proper officer, and shall specify therein the number and size of the cells, the names of the prisoners, and the offences of which they have been guilty; the court before each person was convicted, and the sentence of the court if tried and convicted before any court of record, or if committed by a justice of the peace, then the name of such justice, and the offence of which he was convicted, the age, bodily estate, and behaviour, of every such convict. 31 Geo. III, c. 46, § 8.

And every such return, before it is delivered into court, shall be examined by one of the visiting justices to be appointed as aforesaid, who shall sign such return, and annex thereunto such observations as he shall think fit, on every particular therein contained. § 9.

And in case the gaol shall not be in a state to afford the means of separation as directed by 24 Geo. III, c. 54, the gaoler shall report the insufficiency thereof to the grand jury at every assizes till such means of separation are effected. § 11.

[o] The justices in sessions may appoint clergymen to officiate in gaols according to the rites of the church of England, and allow to each a salary not exceeding 50l. a year; to be paid by the treasurer out of the county rate. 13 Geo. III, c. 58.

[p] By the 3 Hen. VII, c. 3, those that have the custody of gaols, must certify the names of all prisoners, to the justices of gaol delivery, in order

§ 5. RESPONSIBILITY.

V. MAGISTRATES of boroughs are bound by a very ſeveꝛ ſanction to take care that the priſons be kept in ſufficien order, or, at leaſt, that through their diſorder the priſoneꝛ do not eſcape.

If criminals eſcape.

MAGISTRATES are puniſhable arbitrarily, if criminal eſcape through their negligence, or the inſufficiency of th jail: in the caſe of debtors, they are liable in the pay

Debtors.

ment of the debt. And, for putting them more on thei

Act of ſederunt.

guard, the court of ſeſſion, by an act of ſederunt [a], declared "they would find magiſtrates of burghs liable for the debt "of rebels who ſhall eſcape furth of priſon in all time hen "after, in caſe they have not ſufficient catbands upon th "doors of their priſons, and lock the ſame ilk night, lea "the rebels pyke or break up the locks."

WHICH duty has always been very ſtrictly enforced [b].

to their trial or diſcharge, on pain of 5l.

And if a gaoler detains a priſoner in gaol after his acquittal, unleſs it be for his fees, (not for meat, drink, or lodging), this is an unlawful impriſonment. 2 Inſt. 53.

And a gaoler muſt not diſobey a writ of *habeas corpus*, for want of his fees; but the court will not turn the priſoner over till the gaoler be paid all his fees. 2 Haw. 151.

But by the 14 Geo. III, c. 20, if the priſoner is acquitted, or diſcharged upon proclamation for want of proſecution, or hath no bill found againſt him, he ſhall pay no fee to the gaoler for his diſcharge; but ſuch fee as hath been uſual, not exceeding 13s. 4d. ſhall, on certificate of a judge or juſtice before whom ſuch priſoner ſhall have been diſcharged, be paid out of the general county rate.

And by 32 Geo. III, c. 45, judge of aſſize, or juſtices in ſeſſion or juſtice of the peace, may or any convict upon his diſcharge fro priſon; and alſo any perſon wh ſhall be acquitted at the aſſizes, ſeſſions, or diſcharged by proclam ation or otherwiſe, to be conveye by a vagrant paſs as directed by Geo. II, c. 5, who ſhall by himſ or any other perſon, apply to ſu court or juſtice to be ſo conveyed and the judge, juſtices, or juſti aforeſaid, ſhall certify in ſuch pa that the perſon ſo conveyed was di charged from priſon, or acquitte or otherwiſe diſcharged at the aſſiz or ſeſſions as the caſe may be, fo which paſs no fee ſhall be paid. §

[a] 11th Feb. 1671.

[b] Thus, in a late caſe, the magi trates of Ayr were ſubjected, whe the priſoner had, by means of

§ 5. RESPONSIBILITY.

THE magiſtrates are liable to the creditor in the firſt inſtance. The creditor need not diſcuſs the debtor, though afterwards diſcovered; but the magiſtrates will have recourſe againſt the debtor himſelf, or any other perſon who may have been aiding to him in his eſcape [c].

Muſt the creditor diſcuſs the debtor?

EVEN though there be no inſufficiency in the priſon, any delay in ſearching for the priſoner will ſubject the magiſtrates [d].

paint-ſaw, made his eſcape by cutting through the iron bars of the priſon window. The magiſtrates, it was obſerved, muſt either employ ſome men to watch the priſon, or every other precaution to make it ſenſible. The device, it was obſerved, could not have been ſucceſsful had the priſon had an arched roof. 27th Jan. 1803, Dun and Attorney againſt Magiſtrates and Jailors of Ayr.

This deciſion ſeems contrary to that of Brodie againſt the Magiſtrates of Elgin; where the lords found, "that "the magiſtrates of a royal burgh "were not liable for the eſcape of a "priſoner for debt, who had got out "by means of falſe keys without "any connivance or culpable neglect "of the jailor." July 1759. Fac. Coll. and Diſt. Vol. iv, *voce* Priſoner. Indeed, as the catbands were not locked that night, perhaps it may be thought they ſhould have been found liable in terms of the act of ſederunt. The anſwer, that that circumſtance did not facilitate the eſcape, ſeems ſtrongly relevant. The favourable circumſtance in this caſe was, that the doors were opened by an accomplice from without.

[c] Chalmer, &c. againſt the Magiſtrates of Tain, 14th Dec. 1757.

[d] Gall againſt the Magiſtrates of Forfar, 29th January 1747. In this caſe, to be ſure, it was diſputed whether the priſon was not inſufficient, in ſo far as there was no vault below the priſon, which was floored with large oak boards upon oak joiſts, and that the priſoner had eſcaped by forcing up, in the night time, three of thoſe boards, and thereby getting down to a ſhop which is immediately below the priſon room, (and which has been there paſt memory), and by getting out at the window of ſaid ſhop, which, as uſual in ſhops, was bolted on the inſide. But lord Kilkerran obſerves, "there was no oc-"caſion to give judgment upon the "point, as all agreed that they were "liable upon the other, and ſo the "interlocutor was given, in general, "finding them liable as above." However, it will occur, that on the principles of the deciſion in the caſe of Ayr, there were grounds for ſubjecting the magiſtrates even on the footing of inſufficiency.

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FARTHER, even ſhould the priſoner not eſcape, ſtill the magiſtrates will be ſubjected if he had an opportunity of doing ſo, or was allowed to go out for air or exerciſe; and, in ſhort, if he was not kept in that cloſe confinement that gives the creditor a chance of getting payment of his debt *ſqualore carceris* [f], or if there be any delay in committing him to priſon [g].

If the purſuer might have eſcaped.

If the priſoner was impriſoned *meditatione fugæ.*

IN caſe of the eſcape of a debtor impriſoned on a warrant *meditatione fugæ*, the magiſtrates are not liable for the debt, but are conſidered only as cautioners *judicio ſiſti*; and, therefore, if the priſoner be recommitted before they are required to preſent him in court, no claim lies againſt them [h].

Management of the priſon.

BUT, farther, magiſtrates will be liable if they diſmiſs the priſoner without the proper and regular warrant. A priſoner, on a criminal warrant, cannot be ſet at liberty, unleſs in conſequence of a warrant of liberation under the hand of a competent judge. And, in the caſe of priſoners for debt ſtrictly ſpeaking, a regular warrant is neceſſary: as no debtor can be impriſoned unleſs by letters of caption under the ſignet; ſo regular letters of liberation ſhould alſo be neceſſary to juſtify ſetting priſoners at liberty. But, to ſave expence

[f] 8th June 1790, Shortreed againſt Magiſtrates of Annan. The ſheriff of the county was committed to priſon for debt. The priſon or town-hall and court-room were apartments of the ſame building. The magiſtrates had long been in the practice of allowing priſoners, on whom they could depend, acceſs to the hall, which was no way ſecured. And, in this caſe, the ſheriff held courts there. He did not eſcape; but the magiſtrates were ſubjected in payment of the debt for which he had been impriſoned. And the houſe of lords affirmed the judgment.

[g] Two debtors were preſented to the magiſtrates of Lochmaben, on the 25th March, but were left at liberty till the 27th. The magiſtrates were found liable for the debt and for expences. 13th June 1781, Bell againſt the Magiſtrates of Lochmaben, Dict. Vol. iv, v. Priſoner.

[h] 16th Nov. 1792, Brown againſt the Magiſtrates of Lanark. Dict.

§ 5. RESPONSIBILITY.

the debtors, a written diſcharge by the creditor in the caption is ſufficient for debts under 200 merks [1]. And in practice, a written diſcharge is held ſufficient, whatever be the amount of the debt.

In the caſe of a *ceſſio bonorum*, the decree muſt be extracted before it can have effect. "A debtor having been imprisoned, obtained a decree of *ceſſio* on the laſt day of the winter ſeſſion, whereupon the jailor immediately ſet him at liberty. The creditor proſecuted the magiſtrates of Edinburgh, on the ground, that this liberation was illegal, as a decree of *ceſſio* before it is extracted, and ſtill more, when, by the forms of the court, it is incapable of being extracted, is of no avail. The lords found the magiſtrates liable in the full ſums contained in the diligence [k]."

No ſpiritous liquor ought to be allowed to be ſold in the jail. By the 24 Geo. II, c. 40, is is enacted that no licence ſhall be granted for retailing ſpiritous liquors within any jail or priſon; and the penalty of tranſgreſſing this act is fixed

[1] Act of ſederunt, 5th Feb. 1675. "The lords . . . finding that where "the debt for which perſons are "incarcerate is inconſiderable, the "expence of procuring a charge to "ſet at liberty, will ſometimes near "equal the debt itſelf, the priſoners "being alſo poor, and not able to "ſatisfy the ſaid expences: There"fore the ſaid lords do authorize "and allow the magiſtrates of burghs "to ſet at liberty out of their tol"booths perſons impriſoned for debt, "by virtue of letters of caption, upon "production of a ſufficient diſcharge "of the debt granted by the creditor, "at whoſe inſtance they are incar"cerate, bearing a conſent to the "debtor's liberation, and duly regiſ"trat, if the ſum do not exceed 200 "merks Scots, and the priſoner be "not arreſted at the inſtance of other "parties; the magiſtrates or keeper "of the tolbooth being always care"ful to keep an extract of the ſaid "diſcharge; and finds no neceſſity in "this caſe of a charge to ſet at liber"ty; but, if the ſum for which the "debtor is incarcerate, exceed 200 "merks Scots, the lords diſcharge "the magiſtrates of the burgh to "liberate him out of priſon, without "a ſuſpenſion and charge to ſet at "liberty under his majeſty's ſignet."

[k] 8th July 1788, Wilſon againſt Magiſtrates of Edinburgh. Fac. Coll.

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at *one hundred pound*, whereof one moiety goes to the king, and another, with full coſts of ſuit, to the proſecutor [l].

BOROUGHS are liable to keep a free jail, which includes the expence of a jailor as well as of the priſon itſelf. They are not entitled, therefore, to exact dues from priſoners, whether confined for debt, or upon a criminal warrant; unleſs, perhaps, in particular circumſtances for better accommodation, if required [m].

[l] This evil had prevailed to a great height even in Edinburgh; but the magiſtrates, being called before the court, aſſured their lordſhips it ſhould be corrected in time to come.

[m] M'Whinnie againſt Keepers of the priſon of Ayr. 7th Dec. 1803. "It was the decided opinion of the "court, that the magiſtrates of every "burgh were obliged, at the expence "of the burgh, to keep up a free "jail; and that neither they nor "their jailors were entitled to exact "any ſuch dues from the debtors, "who might be incarcerated as was "here attempted." The contrary practice of exacting fees has become very frequent throughout the country, and was the ſource of great oppreſſion. The evil has gone to that height, that the court have thought it neceſſary to appoint a committee to take the matter into conſideration, with a view to regulate it in time to come, by an act of ſederunt. The magiſtrates of Glaſgow have lately publiſhed a ſet of very good regulations for the management of the priſon.

CHAP. XII.

Of the legal Provisions for the Relief of Prisoners.

I. SQUALOR *carceris*, by means of which creditors are entitled to attempt procuring payment of their debts, implies close confinement alone; but does not justify any aggravation thereof by bad air, or unwholesomeness of the prison. § 1. BAD HEALTH. *Squalor carceris*, means confinement only.

ACCORDINGLY, the magistrates, on any medical practitioner's certificate, *on oath*, that the confinement threatens the prisoner's life, have a discretionary power to remove him to some other place within their jurisdiction. This practice, agreeable to the native humanity of our common law, had obtained at an early period, and rather been carried to excess. It was regulated by act of sederunt [a]. The debtor must be

[a] 14th June 1671. "The lords "considering, that albeit by the law, "magistrates of burghs are obliged "to detain, in sure ward and firm- "ance, persons incarcerate in their "tolbooths for debt, yet hitherto "they have been in use to indulge "prisoners to go abroad upon several "occasions; and it being expedient, "that, in time coming, the foresaid

§ 1. BAD HEALTH.

confined to ſome houſe within the juriſdiction, under th cuſtody of ſome perſon authorized by the magiſtrate to loo after him, under which cuſtody he muſt ſtill be, even ſhoul it be found neceſſary to indulge him with air and exerciſe

Certificate of bad health.

THE magiſtrates do this at their own expence, if th

" liberty, taken by magiſtrates of " burghs, ſhould be reſtrained, and " the law duly obſerved, therefore " the ſaid lords do declare, that here- " after it ſhall not be lawful to the " magiſtrates of burghs, upon any " occaſion whatſoever, without a " warrant from his majeſty's privy " council, or the lords of ſeſſion, to " permit any perſon, incarcerate in " their tolbooth for debt, to go out " of priſon, except only in the caſe " of the party's ſickneſs and extreme " danger of life, the ſame being al- " ways atteſted upon oath, under " the hand of a phyſician, ſurgeon, " apothecary, or miniſter of the goſ- " pel in the place; which certificate " ſhall be recorded in the town court " books: And, in that caſe, that the " magiſtrates allow the party only " liberty to reſide in ſome houſe " within the town during the con- " tinuance of his ſickneſs, they being " always anſwerable that the party " eſcape not, and, upon his recovery, " to return to priſon. And the lords " declare, that any magiſtrates of " burghs, who ſhall contravene the " premiſes, ſhall be liable in payment " of the debt for which the rebel " was incarcerate. And appoints this " act to be intimate to the agent for " the royal burrows, and to be inſert " in the books of ſederunt."

b Fullerton againſt Magiſtrates Ayr, 7th March 1781. " The fo " lowing circumſtances were fou " ſufficient to ſubject the magiſtra " of a burgh to the payment of " debt due by a priſoner, in terms " the act of ſederunt, 14th Ju " 1671.—

" Inſtead of complying with t " act, by requiring the atteſtation " a phyſician, upon oath, bearin " that the debtor actually labour " under a diſeaſe, attended wi " deadly ſymptoms, they had d " miſſed the debtor, upon the phy " cian's declaring, *upon ſoul and co* " *ſcience*, that the debtor's contin " ance in confinement might, " reaſon of his valetudinary ſtate " health, prove fatal to his life; a " inſtead of confining the debtor " a houſe within the burgh, and " manding him to priſon upon " recovery, they had allowed him " go through the country, for " ſpace of five months, in the ex " ciſe of his profeſſion as a coun " ſurgeon.

" It may likewiſe be remark " that the magiſtrates had accep " a bond from the debtor's frie " ſecuring them againſt the co " quences of their procedure." Col.

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debtor cannot afford it. During this indulgence, the debtor is ſtill underſtood to be in confinement. § 1. BAD HEALTH.

II. IT is only criminals who muſt be maintained by the public. Debtors, if they have no funds, muſt be maintained by thoſe who impriſon them, whether with a view to their own perſonal advantage, or to gratify their reſentment. § 2. ACT OF GRACE, WILL. P. 1, 1696, c. 32.

THE act of grace, therefore [c], as it is called, provides, that, on any priſoner for a civil debt making oath before the magiſtrates of the juriſdiction, that he has not wherewith to maintain himſelf, the magiſtrate may require the creditors, upon whoſe diligence he is impriſoned, to provide and give ſecurity for an alimony to him, at a rate not under 4d. a day; which, if the creditor refuſe or delay to do for 10 days thereafter, it ſhall be lawful for the magiſtrate to ſet the priſoner at liberty. If the debtor cannot maintain himſelf. Rate of ſtatutory alimony. If the creditor gives no aliment.

THE debt and diligence, upon which the debtor was impriſoned, are not diſcharged by the magiſtrate's ſetting him free upon this ſtatute, and therefore the creditor may again uſe perſonal execution againſt him upon the former capture [d]. But, if he abuſe that power in an oppreſſive manner, he may be condemned in a fine for that abuſe, and the debtor will have relief by a ſuſpenſion [e]. Does liberation for no aliment diſcharge the debt?

THIS obligation upon creditors to ſupport their indigent debtors, Mr. Erſkine ſays, took its riſe from the Romans. Accordingly, the code of monarchical France [f], which drew more liberally ſtill from the ſame ſource, had adopted the very ſame regulation, by two edicts; the one in 1670, and the other in 1680, not many years prior to our act of grace [g].

[c] 1696, c. 32.
[d] Abercromby againſt Brodie, 19th June 1759, Fac. Col.
[e] Erſk. B. iv, t. 3, § 28.
[f] Nov. 135, c. 1.
[g] The former is in theſe words:

§ 2. ACT OF GRACE.

ALL debtors, impriſoned for payment of a ſum of money, are entitled to the benefit of the act of grace, without reſpect to the nature and origin of the debt, as implying blame in them or not[5]. This privilege no perſon is entitled to who is impriſoned *ad factum præſtandum*.

Who entitled to the act of grace?

If in the caſe of fines for delinquency?

§ 3. CESSIO BONORUM.

III. *CESSIO bonorum* is the moſt important of the *remedia miſerabilia*, deviſed, by the Scottiſh law, for the relief of debtors, who, by means thereof, obtain their liberty, on making a full ſurrender of their effects to their creditors.

" Sur deux ſommations faites à dif-
" ferents jours aux créanciers qui
" ſeront en demeure de fournir la
" nourriture au priſonnier, et trois
" jours aprés la derniere, le juge
" pourra *ordonner l'élargiſſement du*
" *priſonnier, partie préſente, ou duement*
" *appelié*." The latter edict extended the former, with a view to the greater conveniency of priſoners, on the narrative, " que ſouvent le priſonnier
" n'avoit pas le moyen de faire ces
" ſommations.... le roi, par ce même
" edit, art. 5, ordonna qu'après l'ex-
" piration des premiers quinze jours
" du mois, pour lequel la ſomme né-
" ceſſaire aux aliments n'auroit point
" été payée, le juge, ſur la ſimple
" requiſition du priſonnier, et le cer-
" tificat du geolier, que la ſomme n'a
" point été payée, ordonneroit l'é-
" largiſſement du priſonnier, pourvu
" que les cauſes de l'empriſonne-
" ment, et des recommandations
" n'excedaſſent pas la ſomme de
" deux mille livres; et, ſi les cauſes
" excédoient cette ſomme, que l'é-
" largiſſement, en ce cas, ne pourroit
" être prononce qu'au ſiege." Pothier Oeuvres Poſthumes, t. 3, p. 294.

[5] Decem. 7, 1787, Clerk against Johnſton and Procurator Fiſcal. Clerk was impriſoned for payment of a fine of 60l. ſterling, impoſed by the juſtices of peace, on account of his being guilty of an aſſault and battery. He applied for the benefit of the act 1696. It was pleaded, he was not entitled to an aliment, as the impriſonment was in conſequence of a delict. The court of ſeſſion were of opinion, that a fine, or damages, ariſing *ex delicto*, were truly a civil debt, and found him entitled to be alimented by thoſe to whom the fine was to accrue. And the ſame has ever ſince been held as fixed law. At one period, the court rather inclined to the oppoſite conſtruction of the act.

The preſent idea is agreeable all to what obtained in the French law. This privilege there being mentioned as applicable to all priſoners in general, although the diſtinction between fines and damages, and civil debt, was not only known, but more regarded in their law than in ours, as we will ſee in treating of *aliments* (in the language of the civilians *miſerabile remedium*.

§ 3. CESSIO BONORUM.

e benefit of *ceſſio bonorum* ariſes from a twofold founda- riz. "the compaſſion of human miſery;" and from deſign of the incarceration not being penal, but againſt auders or concealers of their eſtate [h]."

Ceſſio when firſt introduced by the Roman law.

he Roman law, creditors were firſt indulged with this ge by the *lex julia*. The debtor, craving this privi- nuſt prove inſolvency [i]. But, as in the caſe of the grace, ſo the benefit of the *ceſſio* is not denied to thoſe who are owing *ex delicto* [k].

In debts of *delicto*.

the benefit of *ceſſio bonorum* was refuſed to a bank- where his inſolvency had proceeded, not from unfore- ſes, but from extravagant living, unſuitable to his [l].

If the debtor keeps no books.

benefit of a *ceſſio* was refuſed to a perſon who dged he kept no books; a circumſtance that ren- it impoſſible for him to prove that his bankruptcy had ccaſioned by innocent misfortunes [m]. For no debtor

it, B. 4, t. 52. § 31.

. 4, 1775, Sharp againſt Tur- t. Vol. iv, t. 1, Priſoner.

rch 5, 1791. "M'Dowal mpriſoned, for payment of a of damages againſt him for tion. Having purſued a *ceſ- ionem*, it was objected, that enefit was not competent to a r *ex delicto*. Anſwered, The er's inſolvency does not ariſe this claim, but from a variety her debts. The lords repelled bjection." M'Dowal againſt e, Dict. Vol. iv, ibid. So alſo, ſubſequent caſe, 15th January Douglas againſt her Creditors. In this caſe, the purſuer was impri- ſoned for payment of damages for defamation.

[i] 12th July 1785, M'Cubbin againſt Thomſon and his Creditors. And though, in a ſubſequent caſe, the be- nefit was granted where the inſolv- ency had ariſen from too great indul- gence in living, ſough againſt his Creditors; yet the court have ſince refuſed the benefit, in caſes of ex- travagant living, and expreſſed an opinion, that the caſe of M'Cubbin was better decided.

[m] 10th March 1786, Fraſer againſt his Creditors, Dict. Vol. iv, Pri- ſoner.

§ 2. CESSIO BONORUM.

is entitled to this privilege, who has been engaged in fr dulent tranſactions [a].

What debtors?

EVERY debtor, impriſoned for a debt of the proper d ſcription, is entitled to the benefit of the *ceſſio*.

Foreigners?

Even foreigner, the greateſt part of whoſe debts had been co tracted abroad, has been found entitled to it [b].

Muſt be impriſoned for ſix months.

BUT no perſon can obtain the *ceſſio*, unleſs he has be impriſoned for ſix months before the application for it. If be out on a bill of health, he may obtain it, that being he as being legally in priſon.

One out on a bill of health.

[a] In the caſe James Scott againſt Croſbie, the purſuer of the *ceſſio* pleaded, that as impriſonment for debt was not *penal*, but merely a *compulſitory* for compelling payment, it followed that the benefit was to be granted to every debtor whatever, provided only there was complete evidence that his funds were all ſpent, and that nothing remained in his power. One reſpectable judge, ſupporting the idea, obſerved, that, at the date of the acts of ſederunt 1666, 17th May, 1669, 26th February, 23d January 1695, there muſt have been two claſſes of bankrupts in view, thoſe who had become ſo from innocent misfortunes, with reſpect to whom the habit was diſpenſed with, and culpable bankrupts, who were ordained "in all time "thereafter to wear a bonnet partly," &c. His lordſhip, therefore, thought it agreeable to the ancient principles of our law, to grant the *ceſſio* in every caſe where there was no ground to ſuſpect a concealment of effects, in the caſe of blame; the *ſtigma* of the habit, in the caſe an innocence without it. But other judges did not go into idea.

They thought it afforded too mu encouragement to fraud, in mercantile tranſactions, to allow the ben to any but the fair trader; and the law had been ſo fixed, by general practice of the court, many years paſt. Scott, at laſt, tained the *ceſſio*; but it was in conſequence rather of Mr. Croſbie withdrawing his oppoſition, than of change of opinion in the court.

[b] 29th May 1804, Mercer and Paſker, &c. Fac. Coll. In Engl the benefit of *ceſſio* was confined natives; but this limitation ar from a ſpecial ordinance of the P 1673, c. 10, art. 2. In Scotla again, no enactment provided that matter, and the court extend it to ſtrangers, on the ſound and beral principles of our common l This, however, muſt depend a g

ſt produce, with the proceſs, a certificate under of one of the magiſtrates of the borough where he red, bearing, that he hath been a month in priſon; hich certificate the proceſs is not to be ſuſtained [p]. § 3. CESSIO BONORUM.

a priſoner is ſet at liberty upon a *ceſſio*, he muſt, ore ſhall inſiſt on it, wear, for the future, a par- it, appropriated, by cuſtom, to dyvours or bank-

urt of ſeſſion, by the ſaid act of ſederunt, declared, would not diſpenſe with the wearing of the habit, the caſe of mere misfortune; and they are, by 1696, c. 5, prohibited to diſpenſe with that mark h, if it be not libelled in the ſummons of ceſſio, red and proved, that the bankruptcy was owing to r. Diſpenſing with the habit.

mſtances; for if it ſhall a ſtranger has come to with an unfair view of himſelf from his cre- on the law of his own will not eaſily obtain the ſſe.—Maidmont againſt 29th January 1799.

ederunt, 18th July 1688.

ederunt, 18th July 1688.

of council and ſeſſion do . the magiſtrates of the ive his liberation out of cauſe him to take on and his head a bonnet, part- urn and partly of a yel- r, with uppermoſt hoſe gs on his legs, half brown yellow coloured, conform en delivered to the ma- of Edinburgh, to be keep- ir tolbooth; and that they " cauſe take the dyvour to the mer- " cat croſs, betwixt 10 and 12 o'clock " in the forenoon, with the foreſaid " habit, where he is to ſit upon the " dyvour ſtone the ſpace of ane hour, " and then to be diſmiſſed; and or- " dains the dyvour to wear the ſaid " habit in all time thereafter; and in " caſe he be found either wanting or " diſguiſing the ſame, he ſhall loſe " the benefit of the *bonorum*."

In France, in like manner, debtors were under the neceſſity of wearing the *bonnet verd*. " J'ai," ſays M. Pothier, " toujours vu prononcer ici " cette condition de porter le bonnet " verd; mais je n'ai jamais vu que " des créanciers ayent fait uſage de " ces ſentences, et ayent fournis à " leur debiteur un bonnet verd pour " le porter." Oeuv. Poſt. t. 3, p. 300.

[r] Erſk. B. iv, t. 3, § 27.

CHAP. XIII.

Of Schools.

§ 1. IN GENERAL.

I. *QUID vanæ ſine moribus leges?* Police regulations, vindictive juſtice, can avail little, unleſs due be taken of the public morals.

ON this account, the Scottiſh goverment expreſſed m anxiety, that "the ſubjects, expecially the youth, be " ciſed and trained up in civilitie, godlineſs, knowlege, " learning[a];" thinking that there "are no means " powerful to further this.... than the eſtabliſhing " ſchools in the particular pariſhes of this kingdom, wh " the youth may be taught at the leaſt to write and re " and be catechiſed and inſtructed in the grounds of r " gion[b]." And, at an early period, when men of rank political importance could frequently neither read nor wri ſtatutes enacted, that "all baronis and ſubſtantious f " halderis ſould put thair airis to ye ſchulis[c]."

[a] Act of privy council 1616.
[b] Ibid.
[c] Jas. IV, 1496, c. 87. Pre Balfour "anent ſchulis," p. 132.

dy applied to their caſe. If it can be afforded at all, § 4. CRIMINAL. ſt come from the high court of juſticiary, on a ſpecial ient of the circumſtances of the caſe[x]. Hence juſf peace muſt feel themſelves under the ſtronger obli- s to prevent the evil, by attention to the diſcharge of atutory duty, in attending to the cleanneſs, the ſalubrity priſons, and the treatment of the priſoners.

[x] Hume, Vol. iv, p. 355.

§ 1. IN GENERAL.

BUT the ardour of our countrymen unfortunately ated in ſuch unprofitable contentions, (the ſerious tion of the laſt age, but which are long ago ſunk in contempt and oblivion), without procuring for us an factory information touching the particular ſtate of in Scotland before the reformation; while the pa ſtowed in ſome other countries, to trace the riſe an greſs of ſeminaries of education, are among the ma pendous monuments of learned induſtry.

IT cannot, however, be doubted, that here, as i countries where the popiſh hierarchy obtained, p ſchools were under the management of the clerg maintained by the revenues of the church; which ſen may be traced back to the earlieſt periods of primitiv tianity.

THE philoſophers had divided mankind into two *the few, and the many.* Their inſtructions they conf the former, aſſembled in the academy or the porch; the latter their language was, *Procul ô, procul eſte,* whereas, in Chriſtian congregations, on the other ha great aim was to ameliorate the minds, and incre knowledge and happineſs of *all.* Schools were t early eſtabliſhed for the inſtruction of the children, in the principles of the Chriſtian religion, but like

contemporary with Charlemagne, conſidering our long line of royal authors? whoſe hiſtory one doughty patriot, in his "*Oratio de illuſtribus Scotiæ ſcriptoribus*," commences with the Complete ſyſtem of Political Economy, publiſhed, with other learned works, by king Fergus I, much about the time of Alexander the Great's victory over Darius: "Ferguſium primum Scotorum regem illuſtriſſi hic ſælicem doctrinæ fac turis Scotiæ regibus prim lit, ſcripſit *inter alia legum um librum unum.* Poſt h nadilla..., compoſuit ad p uſum, ut alter Artaxer venatoriarum librum u *que ſalicis ingenii monum* pud M'Kenzie, Vol. i, p. 2

§ 1. IN GENERAL.

ſecular learning. With the increaſe of the hierarchy, and wealth of the church, theſe ſchools multiplied, and were divided into different claſſes [f].

THE canon law contained many injunctions with reſpect to theſe ſchools; and many decrees of the general councils were paſſed, with the view of preventing their neglect. In particular, the Lateran council, held in 1102, expreſſed itſelf as follows: "Since the holy church, like an affectionate "mother, ought to provide means of inſtruction for the "children of the poor, therefore, in each cathedral church, "let a benefice (aliquod beneficium) be ſet apart for a maſ-"ter to teach the clergy thereof, and poor ſcholars [g];" which proviſion was ratified and farther extended by ſubſequent conſtitutions.

IN Scotland, we have every reaſon to imagine, that, prior to the reformation, ſuch ſchools abounded through the country, maintained by the eccleſiaſtical revenues. Accordingly, in reclaiming the patrimony of the church, our firſt reformers uniformly mentioned the maintenance of the ſchools among the other public and pious works to which it was ſacred, and the expence of which had been ſupplied by the former incumbents [h].

[f] Cathedral ſchools were taught in the cathedral church, under the biſhop's immediate inſpection; *epiſcopal ſchools*, in other parts of the dioceſe, under his ſuperintendance. And thoſe taught by the regulars in the monaſteries, which ſoon ſhook off all dependence upon the ſecular metropolitan, were called *cœnobiales*. See Church hiſtory, and Hiſtoire Literaire de la France, 7, 9.

[g] Decretal, L. v, t. 5, § 1:

[h] In the form of church policy drawn up by John Knox, and inſerted in Spottiſwood's hiſtory, p. 160, it is ſaid, two ſorts of men, that is, the preachers of the word and the poor, beſides the ſchools, muſt be ſuſtained upon the rents of the church. So the book of policy preſented to the parliament at Stirling in 1578, c. 9, and 10, "We adhere unto the ſchools "and ſchoolmaſters, who ought and "may well be ſuſtained of the ſame "goods, and are comprehended un-"der the clergy." Spottiſwood, 297.

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PARLIAMENT did not deny the truth of the allegation and though they did not, on that account, reſtore the church lands to the clergy, they paſſed ſeveral acts, providing for the eſtabliſhment and maintenance of the ſchools throughout the country.

THE firſt regular enactment, reſpecting parochial ſchools, was the act of the privy council, which expreſſed, that "the "king's majeſtie, with advice of the lords of his ſecret "council, has thought it neceſſar and expedient, that in "every paroch of this kingdom, whair convenient meanes "may be had for entertaining, a ſchoole ſall be eſtabliſhed, "and a fit perſon appointit to teach the ſame, upon the "expence of the parochiners, according to the quantity and "quality of the paroch, at the ſight, and be the advice of "the biſhop of the dioceſe in his viſitation.

THIS proclamation of James VI was ratified and extended by an act of parliament in the ſucceeding reign [1], which however, and the other enactments during the ſhort and alternate reign of epiſcopacy and preſbytery, need not be taken notice of; the law, after the final eſtabliſhment of preſbytery by king William's parliament, having been regulated by two ſtatutes, the one the act 1693, the great charter of the preſbyterian church, the other the act 1696 "anent the ſettling of ſchools," as they are corrected and enlarged by the 43 Geo. III, c. 54.

ONE IN EVERY PARISH.

II. THE law is expreſs, that a public ſchool be eſtabliſhed in every pariſh; whether great or ſmall, acceſſible eaſily from one part of it to another, or interſected by rivers and arms of the ſea; populous, and conſiſting of arable farms or devoted to ſheep walks, and diſpeopled of its ancient inhabi-

[1] 1633, c. 5.

ants; the reſort of private teachers, or deſtitute of any other means of inſtruction, the pariſh is equally entitled to the benefit of this ſalutary inſtitution, which the law does not make dependent upon any ſpecialties. § 2. ONE IN EVERY PARISH.

SUCH circumſtances never juſtify the want of a ſchool in any pariſh; but local ſituation the law ſometimes conſiders as a good reaſon for two ſchools in one pariſh. The late ſtatute enacts, "That, in caſe of thoſe pariſhes which conſiſt of diſtricts detached from each other by the ſea, or arms of the ſea, or otherways, as where a pariſh conſiſts of two or more iſlands, (of which there are ſeveral inſtances in the Highlands, North Iſles, and Hebrides), or where it is otherways of great extent or population, ſo that one parochial ſchool cannot be of any effectual benefit to the whole inhabitants of ſuch pariſhes, the heritors and miniſter, if they ſhall ſee cauſe, may, on fixing a ſalary of 600 merks, or the value of three chalders of oatmeal, to be computed according to the proviſions of this act, divide the ſame among two or more teachers, according to the extent and population of the pariſh [k]."

THE late ſtatute naturally takes for granted, that each pariſh is already provided in a ſchoolmaſter [l]. The ſtatute, indeed, 1696, takes the wiſeſt method for procuring ſuch an eſtabliſhment in every pariſh. It directs, in the firſt place, the heritors in every pariſh to meet and provide, &c. as the perſons who have the permanent intereſt in the pariſh, and ought to be intereſted in the welfare of its inhabitants. In caſe of their neglect, the act directs "the preſbytery of the

[k] § 11.

[l] This, however, there is reaſon to believe, is far from being the caſe. This appears from the records of the general aſſembly. Repreſentations having been made, from time to time, down to very late years, of the want of ſchools in many parts of the highlands and iſlands.

§ 2. ONE IN EVERY PARISH.

" bounds to apply to the convener of the commiſſioners of " ſupply of the county or ſtewartry, who, or any five " them, at a meeting to be held by the convener upon " 30 day's notice, ſhall have power, *jure devoluto*, and " hereby directed, to elect a perſon to ſupply the vacancy[m]. Or if ſuch pariſh never had any ſchoolmaſter, then the ſaid commiſſioners of ſupply " ſhall have power to eſtabliſh a " ſchool, and ſettle and modify a ſalary for a ſchoolmaſ- " ter[n]." The law thus intruſts the redreſs with the preſbytery, without impoſing on them the diſagreeable part of the buſineſs. They are not authorized to proceed themſelves, either to elect a ſchoolmaſter, or provide a ſalary for him, but merely to lay the matter before the commiſſioners of ſupply[o].

THE ſtatute has not deemed it neceſſary to provide any farther remedy, in caſe of all of theſe reſpectable bodies failing in the diſcharge of this duty. But, were the commiſſioners of ſupply to refuſe obeying the call of the preſbytery, this wrong would be remedied by the ſupreme civil court[p].

[m] Stat. 43 Geo. III. c. 54, § 15.

[n] 1696, c. 26.

[o] 22d July 1768, Mr. George Brown againſt the Heritors of Dunfermline. No ſalary having been ſettled by the heritors, Mr. Brown applied to the preſbytery, who ſuſtained themſelves competent under the ſtatute 1633, c. 5, as having come in place of the biſhop, and found that the mortification is no part of the legal proviſion for the ſchoolmaſter; and modified 200 merks, including the 40l. ſettled by the town, as the legal ſalary of the ſchoolmaſter in all time coming; and appointed the heritors to ſtent themſelves, conform to their valued rent, for the remainder of the 200 merks.

The lords found, that the preſbytery has no juriſdiction in this matter; and therefore advocated the cauſe, and aſſoilzied.

[p] 31ſt July 1773, Miniſter of the pariſh of Reay. The clergyman ſeeing his pariſhioners without the means of inſtruction, made various attempts to prevail upon the heritors to put the act in execution. The preſbytery then made application to the commiſſioners of ſupply, who were guilty of the ſame illegal diſobedience to the law. The miniſter of the pariſh, with concurrence of

§ 2. ONE IN EVERY PARISH.

WERE the minister of the parish and the presbytery of the bounds to concur with the heritors and commissioners of supply in disobedience to the statute, there cannot be a doubt that the court of session would compel the heritors to do their duty, upon the complaint of any one of the parishioners. No human being within the bounds wants either title or interest for enforcing the observance of so pious and necessary an enactment.

§ 3. MAINTENANCE—SALARY.

III. UPON the narrative of the great fall in the value of money, the late statute enacts, that after Martinmas 1803, the salary of each parochial schoolmaster, in every parish of Scotland, shall not be under 300 merks Scots (16l. 13s. 4d.) per annum, nor above 400 merks Scots (22l. 4s. $5\frac{4}{12}$d.) per annum[a]. And within three months after the passing of the said act, the heritors duly qualified and minister of the parish, were ordained to hold a meeting, and determine what the salary should be, whether the *maximum*, *minimum*, or intermediate sum. But they had no power to lower the salary of any schoolmaster which he enjoyed before the late statute. And if any part of the salary is payable in grain or meal, such grain or meal shall continue payable as before, with such additions in money as the meeting shall judge

the presbytery, applied to the court of session by declarator, narrating the refusal of the heritors and commissioners to meet. The lord ordinary made a special order for the meeting of the heritors to be held, in order to execute the statute. At the day appointed, there appeared one heritor, and the minister, who transmitted a report that 200 merks Scots could be necessary. Their lordships pronounced the following interlocutor: "Find that 200 merks is a proper and necessary salary for a schoolmaster of the said parish of Reay, and that 20l. sterling is necessary to build a proper schoolhouse in the said parish, to be built upon an acre of land, called the school-acre, given in donation by Mr. Innes of Sandside; and remit to the ordinary to proceed accordingly; and particularly to allocate and proportion the said yearly salary, and expence of building the schoolhouse, upon the several heritors liable in payment agreeably to law."

[a] 43 Geo. III, c. 54, § 1.

§ 3. MAINTENANCE —SALARY.

proper; and that, in fixing the amount of the ſalary to paid purſuant to this act, the grain or meal ſhall be eſtimated at 200 merks per chalder; which ſalary, when ſo fixe ſhall continue to be paid to the ſchoolmaſter for 25 yea after the paſſing of the act [b]. Farther, the ſchoolmaſter provided in a houſe and garden [c].

THE expence of providing the ſchool-houſe, dwelling houſe, and garden, is to be defrayed by an aſſeſſment on th

[b] § 2 and 3. "If the heritors and "miniſter ſhall neglect or refuſe to "determine the amount of the ſalary "to be paid to the ſchoolmaſter, ac- "cording to the proviſions of the act, "or if any heritor or ſchoolmaſter "ſhall be diſſatisfied with the deter- "mination made, the perſon ſo diſ- "ſatisfied may, within three months "after ſuch meeting ought to have "been held, or ſuch determination "ſhall have been made, apply or ap- "peal to the next quarter ſeſſions "for the ſhire or ſtewarty, whoſe "judgment ſhall be final, and that "no appeal by advocation, ſuſpen- "ſion, or otherwiſe, ſhall be admit- "ted againſt the judgment given at "ſuch quarter ſeſſions; provided al- "ways, that no heritor of the pariſh "from whence the appeal comes, "ſhall vote upon ſuch appeal at the "quarter ſeſſions."

[c] The act 1696 provides, that it ſhall be lawful to patrons to employ the vacant ſtipends, as they ſhall ſee cauſe, excepting from this act the bounds of the ſynod of Argyle; in reſpect that by a former act of parliament, in the year 1690, the vacant ſtipends within the ſaid bounds are deſtined for the ſetting up and maintaining of ſchools in manner therein mentioned; and the ſaid vacant ſtipends are hereby expreſsly appointed to be thereto applied at the ſight of the ſheriff of the bounds aforeſaid.

And the late ſtatute enacts, that in every pariſh where a commodious houſe for a ſchool has not been provided purſuant to the act 1696, c. 26 and where there has not been already provided a dwelling houſe for the reſidence of the ſchoolmaſter, with a proportion of ground for a garden to the extent hereafter mentioned, the heritors ſhall provide a commodious houſe for a ſchool, and a houſe for the reſidence of the ſchoolmaſter (ſuch houſe conſiſting of not more than two apartments, including the kitchen), together with a portion of ground for a garden to ſuch dwelling houſe, from fields uſed for the ordinary purpoſes of agriculture or paſturage, as near and convenient to the ſchoolmaſter's dwelling houſe as reaſonably may be: that ſuch garden ſhall contain at leaſt one-fourth part of a Scots acre, and ſhall be inclosed with ſuch fence as is generally uſed for ſuch purpoſes in the diſtrict or country where it is ſituated. § 8.

h[d]. But, if a garden cannot be allotted to the ſchool- §3. MAINTEN- ANCE —GARDEN,
r, without great loſs and inconvenience, it is optional
heritors, with the authority of the quarter-ſeſſions, to
to the ſchoolmaſter, in lieu of ſuch garden, an addi-
o his ſalary, at the rate of eight bolls per acre, the
or meal being eſtimated at 200 merks per chalder[e].
heritors ſhall neglect to provide the ſchoolmaſter in
accommodations, or he be diſſatisfied with what they
lone, he may bring the matter within the review of the
r-ſeſſions, whoſe judgments are final. The heritor,
whoſe eſtate the ground is taken, has relief againſt the
heritors, according to their valued rent.

thoſe pariſhes where two ſchoolmaſters may be found
ary, the heritors are not bound to provide the ſchool-
s in houſes or gardens, but may, on fixing a ſalary of
erks, or the value of three chalders of oat-meal, to be
ted according to the proviſions of this act, divide the
among two or more teachers, according to the extent
opulation of the pariſh[f]; which proviſions are exclu-
the caſualties which formerly belonged to the readers
lerks of the kirk-ſeſſion[g]; offices that are generally
y the parochial ſchoolmaſter.

ALL heritors poſſeſſing 100l. Scots of valued rent §4. ASSESS- MENT,
the pariſh[h], are entitled to attend the meeting; and
nt, to vote by proxy, or by letter under his hand.
iniſter alſo is a member of the meeting, and the vote
ita: but where there is only one heritor duly quali-
e has two votes[i]. If no preſes be choſen, the heritor
the higheſt valuation has the caſting vote.

Geo. III, c. 54, § 8.
l.
. III, c. 54, § 11.
[g] 1696, c. 23.
[h] § 22.
[i] § 7.

§ 4. ASSESSMENT. THE aſſeſſment is paid by the heritors according to t valued rent. Each heritor has relief from his tenants of t half of his proportion [k]. And becauſe the proportion i poſed on every heritor will be but ſmall, therefore if tw terms' proportion run into the third unpaid, then thoſe th ſo fail in payment, ſhall be liable in the double of their pr portions then reſting, and in the double of every term's pr portion that ſhall be reſting thereafter, ay and while t ſchoolmaſter be completely paid, and that without any d falcation; and that letters of horning, and all other exec torials neceſſary, be directed at the inſtance of the ſcho maſter, for payment of the ſaid ſtipend, and double of t proportions foreſaid. All ſuſpenſions are diſcharged to pa except upon conſignation or a valid diſcharge. Liferent during their lifetime pay the proportion laid upon the li rented lands.

IF a pariſh conſiſts of a royal burgh, or part of a ro burgh, the ſalary is to continue to be paid in the ſame pr portions by them as before the late ſtatute, provided t ſalary be not below the *minimum*; in which caſe, the ſa appeal lies, as in the others, to the quarter-ſeſſion [l].

§ 5. ELECTION. V. THE choice of the ſchoolmaſter is veſted in the minif and heritors, meeting after thirty days premonition by edi citation and circular letters, to the non-reſiding heritors The perſon ſo elected muſt take the oath of allegian Farther, he muſt be found qualified by the preſbytery as his morality and religion; and of ſuch branches of literat as, by the majority of heritors and miniſter, ſhall be deem moſt neceſſary and important for the pariſh. He muſt a ſign the confeſſion of faith and *formula* of the church Scotland [n]. Their determination, as to the qualification

[k] 1696, c. 26. [l] § 14. [m] Ibid. [n] § 16.

ſuch preſentee, ſhall not be reviewed or ſuſpended by any court civil or eccleſiaſtical [o]. If the perſon is not found qualified, another perſon muſt be choſen by the miniſter and heritors within the remainder of the time; otherwiſe, the *jus devolutum* will take place. § 5. ELECTION.

The fees are to be fixed from time to time, at a meeting called in the manner required by the ſtatute, the ſchoolmaſter teaching poor children gratis [p]. But the preſbytery have the power of correcting any thing that appears to them amiſs, with reſpect to the hours of teaching, the length of the vacation uſually given, &c. Their regulations muſt be complied with by the ſchoolmaſter, under the pain of cenſure, ſuſpenſion, or depravation, according to the diſcretion of the preſbytery [q]. In caſe of complaint being made againſt the ſchoolmaſter for miſbehaviour, the preſbytery are entitled to take cognizance of the ſame; and their judgment is final without any appeal to or review by any court civil or eccleſiaſtical. In caſe of depoſition, the ſchool ſhall immediately be declared vacant.

VI. THE preſbytery has no ſuperintendance over private ſchools. By act 19 Geo. II, c. 39, no perſon can keep a private ſchool for teaching Engliſh, Latin, Greek, or any part of literature, until their deſcription be regiſtered, and the maſter qualify by taking the oaths, under the penalty of tranſportation; and 21 Geo. II, c. 34, §. 12. § 6. SUPERINTENDANCE OF THE PRESBYTERY.

[o] § 16. This makes it almoſt unneceſſary to take notice of the caſe of M'Culloch againſt Allan, 26th Nov. 1793; where the court of ſeſſion decided, that the ſentence of the preſbytery was reviewable by the court of ſeſſion, and not by the eccleſiaſtical judicatures. A deciſion not in uniſon with that of the general aſſembly and ſynods, who had been in the practice of exerciſing a power of review in theſe queſtions. This judgment, however, was reverſed in the Houſe of Lords, 18th February 1800.

[p] § 18. [q] § 20.

CHAP. XIV.

Of Religion.

§ 1. IN GENERAL.

I. THE State is "a ſociety of men, conſtituted c "the procuring, preſerving, and advancir "own civil intereſts[a]," *ne quis fur eſſet, neu latro, adulter.* The magiſtrate, therefore, has no right to or perſecute individuals on account of their religious o and never attempted to do ſo without producing, more miſchief and injuſtice.

State, what is it?

Cannot intermeddle with religion.

Beneficial operation of religion.

How termed by the ancients.

BUT the belief of a future ſtate of retribution e peared a powerful auxiliary to human laws, in order attainment, even of thoſe temporal advantages, that enjoyment of property and public quiet and tranc which are the great ends of civil ſociety. Hence, was termed by the ancient philoſophers and poli "the link of ſociety, and foundation of legiſlation; t "wark of authority, and bond of law[b]." Accordin

[a] Locke's Works, Vol. ii, p. 244.

[b] Neque immerito Plato religionem propugnaculum poteſtatis ac legum et honeſtæ diſciplinæ —Grotius de Jure Belli, & c. 20, § 44.

ancient legal inſtitutes, whether real [c] or Utopian [d], are interwoven with ordinances touching religion. § 1. IN GENERAL.

HENCE, too, the more to increaſe their authority, the ancient lawgivers endeavoured to trace the different codes to a divine original. Plato begins his dialogue on the laws with this queſtion, "Do you think, O gueſts, that a god, or ſome "man, was the cauſe of the eſtabliſhment of laws?" . . . to which the anſwer made is, "A god, O gueſt, a god; as it is "moſt juſt to aſſert: with us, indeed, Jupiter; but with "the Lacedemonians, I think Apollo dictated the laws [e]." In like manner, the kings affected a ſacred character [f], Affected a divine origin. Kings alſo did ſo.

[c] For example: The prefaces to the laws of Zaleucus and Charondas, (who were contemporary with Lycurgus, or 950 years before Chriſt), written, the one for the Locrians, the other for the Chalcidic cities of Italy. Zaleucus begins his laws as follows: "Every inhabitant of "town or country ſhould firſt of all "be firmly perſuaded of the being "and exiſtence of the gods; which "belief he will be readily diſpoſed "to entertain, when he contemplates "the heavens, regards the world, "and obſerves the diſpoſition, order, "and harmony of the univerſe; "which can neither be the work of "blind chance, nor of man. Theſe "gods are to be worſhipped as the "cauſe of all the real good we enjoy. "Every perſon, therefore, ſhould ſo "purify and poſſeſs his mind, as to "have it clear of all kinds of evil, "being perſuaded that God is not "acceptably honoured by wicked "perſons, nor acceptably ſerved with "ſumptuous ceremonies, or taken "with coſtly ſacrifices; but with "virtue only, and a conſiſtent diſpo- "ſition to good and virtuous actions." See this beautiful fragment of antiquity largely quoted, and its authenticity defended, by Warburton in his Divine Legation.

[d] As the Dialogues of Plato, and Cicero de Legibus.

[e] Taylor's Plato, Vol. ii, p. 6.

[f] Hence Homer commonly applies to them the epithet Διογενης, born of the gods; and Διοτρεφης, bred by the gods: juſt as the holy ſcriptures call them the *Lord's anointed*—1 Samuel, ch. xxiv, v. 8. Or as, agreeably to the amplifying phraſeology of the eaſt, the laws of Menu (more ancient than thoſe of Lycurgus) ſay, "a king "was compoſed of particles drawn "from thoſe chief guardian deities, "Indra," &c.; and "conſequently ſur- "paſſes all mortals in glory." And "even though a child, muſt not be "treated lightly from an idea that "he is a mere mortal . . . no: he is "a powerful divinity that appears in "a human ſhape."—Sir W. Jones's Works, Vol. iii, ch. 7, p. 242.

§ 1. IN GENERAL.

which, on the one hand, begot a veneration for their perſo and authority; juſt as, on the other hand, the moſt deſp ical monarchs have been practically limited by their bei

Reaſon and effects of it.

"under the controul of laws, believed to be divine, w "which they never claimed any power of diſpenſing [g]."

BUT the derivation of the laws from the interpoſition of ſo tutelar deity in particular, ſo neceſſarily linked the eccleſ tical with the civil polity, that it was impoſſible to reject one without committing an offence againſt the other [h].

IN our own country, as well as throughout all Chr endom, the political ſtate of religion was for many c turies ſtill worſe, when the church claimed even ſup ority over the ſtate, and when its prieſts were not am able to the civil magiſtrate, but aſſumed the power trying individuals for the orthodoxy of their religious o nions, as an offence, not againſt civil ſociety, but againſt

[g] Sir W. Jones's Preface to the Commentary on the Mohammedan Law of Inheritance. Works, Vol. iii, p. 513.

[h] Yet, like Julian of old, Voltaire in his Age of Louis XIV, and with ourſelves the noble author of the Characteriſtics, affect to contraſt the ſociable and tolerant ſpirit of paganiſm with the perſecuting and intolerant ſpirit of Chriſtianity. In truth, ancient paganiſm neither did nor could tolerate the diſbelief of the national gods, or rejection of the public worſhip. Chriſtianity no ſooner made known its pretenſions to be the only true religion, and recommended the renouncing the heathen ſuperſtitions, than it experienced the vengeance of the civil magiſtrate; of the moral and philoſophical Antoni as well as of the bloody Nero. I Plato, in his book of laws, lay down, that "no one ſhall hav "temple in any private houſe"... that "if it ſhall appear that any "poſſeſſes temples, and perform "gies in any other places than "as are public, he who detects "ſhall announce the affair to "guardians of the laws"... And "any one act impiouſly, ſhall ap "to have committed, not the ind "deed of boys, but of impious "whether by ſacrificing to the "in private or in public temples "him be condemned to death, "who has ſacrificed impurely Taylor's Plato, Vol. ii, p. 325.

ſupreme Being; conſigning the execution of their ſentences to the civil magiſtrate, who had no diſcretionary power, but was neceſſitated to commit the victims to the flames [1]. § 1. IN GENERAL.

II. CHRISTIANITY, however, while in its primitive purity, is ſaid to have been planted in this country by Chriſtians flying from the Roman empire, during the perſecutions [k]; and by means of the culdees, or Iriſh preſbyters, maintained among § 2. HISTORY OF IT IN SCOTLAND.

[1] James I, parl. 2, 1424, c. 28, "ment hereticques, that ilk biſhoppe "ſall garre inquire to the inquiſition "of hereſie, quhair onie ſik beis "founden, and that they be puniſhed "as law of halie kirk requires. And "gif it miſtoris, that ſecular power "be called in ſupport and helping of "halie kirk;" under which ſtatute, ſays ſir George M'Kenzie, "the cog-"nition belongs to the church, and "the puniſhment to the ſecular judge; "and this the canoniſts call *tradere "curiam brachio ſæculari.*" Crim. Law, p. 17.

[k] Lord Hailes obſerves, that "the "hiſtory of the church of Scotland, "during remote ages, is involved in "impenetrable obſcurity." (Annals, App. ii, N° 3.) However, the barons, freeholders, and whole community of the kingdom of Scotland, in their famous letter to pope John XXI, ſay poſitively, "that the King "of kings and Lord Jeſus Chriſt, "after his paſſion and reſurrection, "called them living in the uttermoſt "parts of the earth, firſt to his moſt "holy faith; nor would he have them "confirmed by any in this faith but "by his firſt apoſtle, although ſecond "or third in order; viz. the moſt "meek Andrew, the brother of St. "Peter, whom our Saviour would "have to be always their patron." Anderſon's Independency, and Hailes, ib. N° 5.

That Chriſtianity had, in the ſecond century, penetrated into parts of Britain, beyond the limits of the Roman empire, appears from Tertullian's mentioning, among other remote regions early illuminated with the Chriſtian faith, *Britannorum Romanis inacceſſa loca, Chriſto vero ſubdita* (Lib. adverſus Judæos, c. 7:) that is, to uſe ſir George M'Kenzie's tranſlation, that "thoſe inhabitants of Britain, "which could not be ſubdued by the "Romans, yet willingly yielded to "the yoke of Chriſt." Works, Vol. ii, p. 376.

Biſhop Stillingfleet traces the Chriſtianity of South Britain to the apoſtle Paul himſelf. And he inſiſts on the evidence ariſing from this paſſage of Tertullian, that "Chriſtianity was then re-"ceived beyond the wall." But ſo ſtrangely jealous were the Engliſh and Scottiſh antiquaries in his time, for the ſuppoſed honour of their reſpective nations, that that learned writer takes a great deal of pains to ſhew that no ſhare of the merit of this early con-

§ I. IN GENERAL.

Reaſon and effects of it.

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§ 2. HISTORY OF IT IN SCOTLAND.

BUT the papal hierarchy in this country, with its early merits and ſubſequent depravity, was happily ſupplanted by a ſimpler ritual and purer worſhip.

THE Reformation in Scotland was oppoſed by the government. "Its hiſtory opens with a band of martyrs, "who died reſiſting popiſh tyranny over the reaſon and con-"ſciences of men[a]." The perſecution, by which it was attempted to ſtop the progreſs of truth and knowledge, offended the native freedom of the Scots, then beginning to be aided and enlightened by generous leſſons from Greek and Roman learning[b].

THE congregation, (the chief of the nobles, landed-gentry

[a] A memorable clauſe! (ſays lord Hailes), drawn up with ſo much ſkill as to leave entire the queſtion of the independence of the Scottiſh church." Ibid.

[b] Dr. Charters' Sermons, Vol. ii.

Dr. Robertſon remarks, how much the political ſpeculations of Knox and Buchanan are tinctured with ancient learning. Their writings, indeed, and, in an after age, thoſe of Andrew Fletcher of Salton, are among the firſt breathings of whiggiſm. Eventful affairs, and the ſpur of real buſineſs, made Knox diſcuſs the reciprocal rights and duties of kings and their ſubjects, at a period when the learned men of Europe were ſtudents of words, mere ſcholars of the ancients, rather than ſcientific reaſoners themſelves. And, until the ſettlement of the Britiſh conſtitution at the Revolution, modern Europe had ſeen no example of regular ſyſtematic liberty. Hence we find the earlier political ſpeculations of modern times appearing very much in the garb and language of the ancients. This has miſled ſome, ungratefully to throw the foul reproach of practical republicaniſm upon their authors, as if they were of the ſame ſtamp with thoſe harbingers of innovation who have appeared in our own times. But the tranſmarine jargon and anarchical principles that ſtruck at the diſtinctions of rank and property, the ſacred and venerable pillars of civil ſociety, no more reſembled "that ſentiment of liberty, and fire "of heaven," which animated thoſe virtuous and intrepid vindicators of our civil and religious rights, than the licentious reveries of the Munſter fanatics of the ſixteenth century reſembled the benign and ſober piety of the apoſtolical Chriſtians. The Britiſh conſtitution is remoter from the monarchies which the ancients had in view, and really more democratical than that of Athens or of Sparta: that is, true liberty and equality are more direct-

§ 3. MAINTENANCE —SALARY.

proper; and that, in fixing the amount of the ſalary to be paid purſuant to this act, the grain or meal ſhall be eſtimated at 200 merks per chalder; which ſalary, when ſo fixed, ſhall continue to be paid to the ſchoolmaſter for 25 years after the paſſing of the act [b]. Farther, the ſchoolmaſter is provided in a houſe and garden [c].

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[b] § 2 and 3. "If the heritors and "miniſter ſhall neglect or refuſe to "determine the amount of the ſalary "to be paid to the ſchoolmaſter, ac-"cording to the proviſions of the act, "or if any heritor or ſchoolmaſter "ſhall be diſſatisfied with the deter-"mination made, the perſon ſo diſ-"ſatisfied may, within three months "after ſuch meeting ought to have "been held, or ſuch determination "ſhall have been made, apply or ap-"peal to the next quarter ſeſſions "for the ſhire or ſtewarty, whoſe "judgment ſhall be final, and that "no appeal by advocation, ſuſpen-"ſion, or otherwiſe, ſhall be admit-"ted againſt the judgment given at "ſuch quarter ſeſſions; provided al-"ways, that no heritor of the pariſh "from whence the appeal comes, "ſhall vote upon ſuch appeal at the "quarter ſeſſions."

[c] The act 1696 provides, that it ſhall be lawful to patrons to employ the vacant ſtipends, as they ſhall ſee cauſe, excepting from this act the bounds of the ſynod of Argyle; in reſpect that by a former act of parliament, in the year 1690, the vacant ſtipends within the ſaid bounds are deſtined for the ſetting up and maintaining of ſchools in manner there mentioned; and the ſaid vacant ſtipends are hereby expreſsly appointed to be thereto applied at the ſight of the ſheriff of the bounds aforeſaid.

And the late ſtatute enacts, that every pariſh where a commodious houſe for a ſchool has not been provided purſuant to the act 1696, c. and where there has not been alſo provided a dwelling houſe for the reſidence of the ſchoolmaſter, with proportion of ground for a garden to the extent hereafter mentioned, the heritors ſhall provide a commodious houſe for a ſchool, and a houſe for the reſidence of the ſchoolmaſter (ſuch houſe conſiſting of not more than two apartments, including the kitchen), together with a portion of ground for a garden to ſuch dwelling houſe, from fields uſed for the ordinary purpoſes of agriculture or paſturage, as near and convenient to the ſchoolmaſter's dwelling houſe as reaſonably may be: that ſuch garden ſhall contain at leaſt one-fourth part of a Scots acre, and ſhall be incloſed with ſuch fence as is generally uſed for ſuch purpoſes in the diſtrict or country where it is ſituated. § 8.

ified by the genius of the Scottiſh conſtitution, § 2. HISTORY OF IT IN SCOTLAND.
om the times of the mighty Goths," led, after va-
iſſitudes, to the final triumph and exaltation of the
cauſe; by the celebrated deed of relief and conceſ-
nted by the ſovereign at the treaty of Edinburgh—
aboliſhing the pope and his uſurped authority"—
g of the proteſtant confeſſion of faith in the parlia-
60—and the eſtabliſhing the preſbyterian diſcipline
y in the convention of eſtates, 1561. Which enact-
re ratified by the firſt parliament of James VI [a].

72, under Morton's regency, it was agreed by the
ncil and general aſſembly, that the name and office
iſhop and biſhop ſhould be continued during the
nority; but that, with regard to their ſpiritual juriſ-
they ſhould be ſubject to the general aſſembly [b]. In
e aſſembly condemned epiſcopacy as unlawful. In
mes VI eſtabliſhed the preſbyterian government by
it ſoon revived the order of biſhops [d], and, after his
the Engliſh throne [e], proſecuted ſtill farther the eſ-
nt of prelacy. Charles I preſſed the introduction of
gy [f] with ſuch inconſiderate and violent zeal, as

, as well as her hoſtility to
er called nor convinced of
only becauſe they profeſſ-
e worſhip of God. Dr.
B. ii, p. 124: and Dr.
art, in his Hiſtory of the
n, B. ii, p. 148, coincide
g the meaſure.
it is unneceſſary to enter
nous controverſy touching
of the parliament 1560.
uments on the one ſide by
and Dr. Robertſon; and
nts on the other very acri-
ſtated by our learned and
tryman Mr. Innes in his
ay.

b Calderwood tells us, theſe biſhops were named *tulchan* biſhops, as having the name only, without either the juriſdiction or revenues.

c Jas. VI, parl. 12, c. 114.

d 1597, parl. 15, c. 231, ordaining, that all miniſters provided to the title of a biſhop, abbot, or other prelate, have vote in parliament ſicklike as prelates had of old.

e 1606, parl. 18, c. 6; and 1609, c. 6; 1617, parl. 22, c. 1 and 2. The revival of prelacy was aſſented to by the Glaſgow general aſſembly 1612, which was declared to have been *funditus* void by the general aſſembly 1638.

f It was a liturgy prepared by the

§ 2. HISTORY OF IT IN SCOTLAND.

kindled the flames of civil war, and occaſioned the *ſolem league and covenant*, to ſupport the religion as eſtabliſhed i 1580. In 1638, the general aſſembly declared againſt epi copacy. In 1660, Charles II not only reſtored epiſcopac but perſecuted the preſbyterians with all the barbarity popiſh times, as well as made deep encroachments on ci liberty, till he provoked the people to reſiſtance. Their ov throw at Pentland did not extinguiſh the ſpirit of the kin dom. The preſbyterians aſſembled for worſhip with an in their hands, to defend themſelves againſt the ſoldiers e ployed to ſearch them out in the mountains, and hunt th down. The violence of government at length gave bi to a new ſect of preſbyterians, who, though few in numb yet lifted up the fallen ſtandard of religious liberty; a "notwithſtanding their errors, the cauſe of liberty was "debted to their bizarre exertions. Their ſtandard on "mountains of Scotland indicated to the vigilant eye "William that the nation was ripening for a change "While lord Ruſſel and Sidney, and other enlightened "triots in England, were plotting againſt Charles, fro "conviction that his right was forfeited; the Cameroni "in Scotland, under the ſame conviction, had the cour "to declare war againſt him. Both the plotters and the w "riors fell; but their blood watered the plant of reno "and ſucceeding ages have eaten the pleaſant fruit [y]."

Scottiſh biſhops under the direction of archbiſhop Laude.

[u] Called Cameronians, from Camero, their leader; called alſo Cargillites, from another leader. Woodrow calls them alſo Society-people. The principle of their union was the ſolemn league and covenant, the renewal whereof they impoſed on all.

"Their arguments upon this ſub- "ject were ſo far ſtretched as to im- "ply that ſwearing or taking the "covenant, was neceſſary to confer a "right to the crown." (See Dr. merville's Hiſt. Pol. Tran. c. 18, p. However, as Mr. Hume, in his hiſ of that period, juſtly remarks, t fanatical deluſion, inſtead of bein apology for the rigours of the a niſtration, rather affords reaſon f contrary inference, as men c ſcarcely have been carried ſuchlen unleſs provoked by a long trai violence and oppreſſion.

[x] Dr. Charters' Serm. V. ii, p.

[y] Ibid. 373.

: reigns of Charles and James were, in regard to Scot- § 2.
ſanguinary period of progreſſive cruelty. The latter HISTORY OF IT IN
p the meaſure of guilt. The tyrannical violation of SCOTLAND.
aluable right, and invaſion of every valuable comfort,
th produced and juſtified the Revolution, when king
ı accompliſhed the work of our deliverance.

Scottiſh nobility and gentry in London addreſſed
ı, deſiring him to take upon him the " adminiſtra-
:ivil and military; and to call a meeting of the eſtates
:curing the proteſtant religion, the ancient laws and
ies of that kingdom [z]." William accordingly called
ıg of the eſtates, and added, " Now it lies on you,
ter upon ſuch conſultations as are moſt probable, to
you on ſure and laſting foundations, which we hope
will ſet about with all convenient ſpeed, with regard
: public good and to the general intereſts and inclin-
s of the people, that after ſo much trouble and great
ing, they may live happily and in peace [a]." The
ıpproved of the addreſs by the Scottiſh noblemen and
ien in England, " and declared the ſame to have been
t of duty, tending to the good of the proteſtant reli-
in general, and of this nation in particular, in all its
:rns [b]. In their anſwer to king William, they thank
accepting " the adminiſtration of public affairs, and
:ning the eſtates;" and ſay, " we ſhall with all con-
nt ſpeed take your gracious letter into conſideration,
ıg ſhortly, by the bleſſing of God, to fall upon ſuch
ıtions as may be acceptable to your majeſty, ſecure
roteſtant religion, and eſtabliſh the government, laws,

Acts, ſmall edit. Vol. iii,

r from king William, king
d, for the Eſtates of Scot-

land; 16th March 1689. Scots Acts, ibid.

[b] 19th March 1689, ibid, p. 133.

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" and liberties of this kingdom, on ſolid foundations, m
" agreeable to the general good and inclinations of t
" people [c]." And this momentous duty they ſoon after c
charged by their memorable declaration, that " king Jan
" the ſeventh being a profeſt papiſt, did aſſume the re
" power and acted as king, without ever taking the o
" required by law, and hath, by the advice of evil a
" wicked counſellors, invaded the fundamental conſtitut
" of the kingdom, and altered it from a legal limited m
" archy to an arbitrary deſpotic power, and hath exerci
" the ſame to the ſubverſion of the proteſtant religion, a
" the violation of the laws and liberties of the kingdo
" inverting all the ends of government, whereby he h
" forfaulted his right to the crown, and the throne is
" come vacant [d];"—by the claim of rights and ſpecifica
of the tyrannical acts which juſtified the ſentence. And
the reſolution, " that William and Mary, king and queen
" England, France, and Ireland, be and be declared k
" and queen of Scotland, to hold the crown and royal d
" nity of the ſaid kingdom of Scotland, to them the ſ
" king and queen during their lives, and the longeſt li
" of them, and that, that the ſole and full exerciſe of t
" regal power be only in and exerciſed by him the ſaid ki
" in the names of ſaid king and queen, during their jo
" lives; and after their deceaſe, the ſaid crown and ro
" dignity of the ſaid kingdom to be to the heirs of the bo
" of the ſaid queen; which failing, to princeſs Anne
" Denmark, and the heirs of her body; which alſo failin
" to the heirs of the body of the ſaid William king of E
" land [e]." Which " chearful offer of the Crown," Decl
ation, Claim of Right, and Grievances to be redreſſed in
firſt parliament [f], together with " the Oath to be adminiſte

[c] 23d March 1689, ibid, p. 136.
[d] 11th April 1689, ibid, p. 152.
[e] Ibid.
[f] Artic. of Grievances, 13th A
1689, ibid, p. 155.

king and queen at their acceptance of the crown," § 2.
nmunicated to William[g] by a committee, being one HISTORY OF IT IN SCOTLAND.
very eſtate, whom they ſpecially enjoined to ſee the
d in their preſence, and to ſee the oath be ſworn
:d by them[h]. This ſolemn and momentous com-
on between William and the nation was cloſed by
rs, the one from his "majeſty to the eſtates, declar-
had accepted the crown and taken the oath;" and
erving, "we ſhall never believe that the true intereſt
people and the crown can be oppoſite[i];" and the
the anſwer of the eſtates[k];" which were thereafter
l and turned into a parliament.

arliament began its operations by aboliſhing prelacy[l];
; the act 1669, which aſſerted the king's ſupremacy
eccleſiaſtical[m]; reſtoring the preſbyterian miniſters
: thruſt from their churches, on account of non-
ty to prelacy[n]; ratifying the confeſſion of faith, and
ie preſbyterian church government[o], that is, by kirk
preſbyteries, provincial ſynods, and general aſſem-
ſere opens the firſt dawning of more tolerant prin-
is eſtabliſhment of the preſbyterian government be-
npanied with a liberality towards the epiſcopalian
, that does the hation the greater honour, conſider-

directed from the Eſtates
g's Majeſty, 24th April
p. 164.
tions, by the Eſtates of
) the Earl of Argyle, Sir
ntgomery, and Sir John
nominated and appointed
ie King and Queen with
the Crown.
ıy 1689, Scots Acts, Vol.
mall edit.

[l] 1689, c. 3. App. of Statutes, No. 58.

[m] 1690, c. 1, App. of Statutes, No. 59. The ſecond article in the above mentioned Liſt of Grievances had declared, "that the firſt act of parliament 1669 is inconſiſtent with the form of government now deſired, and it ought to be abrogated."

[n] 1690, c. 2, App. of Statutes, No. 60.

[o] Ibid. c. 5, ibid. No. 60.

§ 2. HISTORY OF IT IN SCOTLAND.

ing the recency as well as enormity of its sufferin epiſcopacy [p].

§ 3. NATIONAL ESTABLISHMENT.

III. THE church of Scotland was now eſtabliſhed and more liberal principles than formerly. The early r had unanimouſly refuted, and courageouſly reſiſted, of the government, to compel them to adhere to a and erroneous church: and in the courſe of that ar had taught many noble leſſons of civil and religiou Yet they appear to have been ignorant of this politic that the magiſtrate is no more entitled to employ p penalties to compel individuals to embrace truth, tha brace falſehood; and cannot do ſo, without being g the one caſe as much as in the other, of tyranny an ſion. They went no farther length than to ſay, "

[p] "Under the pain of being deprived and loſing their benefices:" indeed, the eſtates required the miniſters to read the proclamation from their pulpits "againſt the owning of the "late king James;" but they prohibited and diſcharged "any injury "to be offered by any perſon whatſoever, to any miniſters of the goſpel, either in churches or meeting "houſes, who are preſently in poſſeſſion and exerciſe of their miniſtry therein, they behaving themſelves as becomes under the preſent government." Proclamation, App. xiii, 1689, Scots Acts, Vol. iii, p. 154, ſmall edit.

The act 1690, c. 5, (App. of Statutes, No. 61), followed out the ſame benevolent plan. Where the epiſcopalian miniſters had "either deſert"ed, or been removed from preach"ing in their churches, preceding "the 13th of 1689," or had been "deprived for not giving obedience "to the act of the eſtate clared ſuch pariſhes to l "and that the preſbyteria "exerciſing their miniſt "any of theſe pariſhes, "the laſt incumbent is de "deſire or conſent of t "ſhall continue their poſſ "have right to the ben "ſtipends." Under thoſe epiſcopalian clergymen, wh with the proclamation, we without moleſtation to pre pariſh churches, and enjoy till their death. "And t De Foe, in the Preface to l of the Union, p. 27) "they "this day; a kind of toler "ſuperior to that in En "theſe enjoy the preſby "pends and manſes; and "their pariſhes the eſtabliſ "miniſters preach by ther "ing houſes to this hour."

§ 3. NATIONAL ESTABLISHMENT.

"ought to ſuffer for religion that is not found obſtinate in "his damnable opinion [a]." They proteſted, indeed, "that "it be lawful to us to uſe ourſelves in matters of religion and "conſcience, as we muſt anſwer unto God [b]." But this they qualified, by adding, "until ſuch time as our adver- "ſaries be able to prove themſelves the true miniſters of "Chriſt's word [c]." They required, indeed, "that our bre- "thren be not condemned for heretics [d];" but they added, "unleſs, by the manifeſt word of God, they be convinced "to have erred from that faith which the Holy Spirit wit- "neſſeth to be neceſſary to ſalvation; and if ſo they be," they expreſsly ſay, "*we refuſe not but that they be puniſhed* "*according to juſtice*, unleſs by *wholeſom admonition they can* "*be reduced to a better mind* [e]."

Intolerant principles of the reformers.

At the very time they were a perſecuted ſect.

Cauſe of their error.

THIS radical error, ſo repugnant to the general ſpirit of their political creed, they ſeem to have fallen into, by not adverting to the peculiar nature of a theocracy. The Moſaical directions for puniſhing idolatrous Jews were applicable to that extraordinary diſpenſation alone under which they lived. Theſe, however, the reformers miſtook for rules of perpetual univerſal obligation. The ſword, they imagined, was held by the magiſtrate for the puniſhment, not of "evil doers" only, but likewiſe of heretical opinions.

Jewiſh theocracy miſunderſtood.

Not guilty of inconſiſtency afterwards in framing penal ſtatutes.

THESE intolerant tenets they thus openly profeſſed, even at the very time they were themſelves ſmarting under the rod of perſecution. Conſiſtent, at leaſt, therefore, it certainly was, however unjuſtifiable afterwards to accompany the eſtabliſhment of preſbytery with thoſe penal ordinances, which tarniſh the glory of the reformation [f].

[a] Petition of the Proteſtants to the Queen Regent. Knox's Hiſt. B. ii, p. 140, 4to edit.

[b] Proteſtation made in the parliament 1558. See Knox's Hiſtory, B. ii, p. 141.

[c] Ibid. 141.

[d] Letter given into parliament 1558. Knox's Hiſtory, B. ii, p. 139.

[e] Ibid. 140.

[f] Thus the firſt book of diſcipline, (compoſed by Knox), containing an

§ 3. NATIONAL ESTABLISHMENT. Coronation oath.

NAY, by the oath preſcribed by act of parliament to be taken at the coronation, the king promiſed, not only "to "maintain the true religion of Chriſt Jeſus .... now re- "ceived and preached within this realm," but alſo "to "aboliſh and gainſtand all fals religion contrare to the ſamen "... and out of thair landes and empyre, they ſall be care- "ful to rute out all heretikes, and enemies to the trew "worſhip of God, that ſall be convicted by the trew "kirk of God of the forefaid crimes [b]." This perſecuting clauſe, as forms remain long unaltered after the change of opinions, was contained in the oath tranſmitted by the eſtates to king William, but refuſed by that monarch, a lover of religious as well as civil liberty, till it was diſtinctly underſtood and explained "that he did not mean to become "a perſecutor; and, on the aſſurance of the commiſſioners "that ſuch was not its import," he "proteſted that in that "ſenſe only he received the oath [c]."

enumeration of various popiſh doctrines, which it condemns, and then proceeds as follows: "Which things, "becauſe in God's ſcriptures they "neither have commandment nor "aſſurance, we judge utterly to be "aboliſhed from this realm; affirm- "ing farther, that the obſtinate "maintainers and teachers of ſuch "abominations ought not to eſcape "the puniſhment of the civil magiſ- "trate." Explication of the firſt Head of Doctrine. See Knox's Hiſtory, 4 ed. p. 484.

Thereafter, in like manner, paſſed the act 1600, c. 17, requiring, "that "all his highneſs ſubjects ſhould "embrace the religion preſently pro- "feſſed, as well by hearing of the "word, as participation of the ſa- "craments." "And that all his "highnes ſubjects ſhall communicate "once every year ... under the pe- "nalties following," &c. See alſo the act 1587, c. 24, "Anent tryal "and puniſhment of the adverſaries "of the true religion," whereby profeſſed papiſts were capitally puniſhable, and hearers of maſs, and withdrawers from the preaching of the word, were to incur the tinſel (forfeiture) of their moveable goods and liferent. The ſame ſpirit runs through the famous covenants. By the ſolemn league and covenant 1643, which bound ſubſcribers "to the "extirpation of popery, prelacy, ſu- "perſtition, hereſy, ſchiſm, profane- "neſs, and whatever elſe ſhall be "found contrary to ſound doctrine, "that the Lord may be one, and his "name one, in the three kingdoms." Collection of the Laws in favour of the Reformation in Scotland, p. 91.

[b] 1567, c. 8. This oath was afterwards confirmed by ſubſequent ſtatutes, as, for example, 1581, c. 9.

[c] Laing's Hiſt. of Scotland, V. ii B. 9, p. 194. Sir J. Dalrymple's Mem of Great Britain, V. i, p. 226.

he ſecond book of diſcipline teaches, that "the ate ought to aſſiſt, maintain, and fortify the juriſ- of the kirk [d];" "and puniſh them civilly that t obey the cenſure of the ſame, without confound- rays the one juriſdiction with the other [e]." And ly, perſons excommunicated "for not conforming lves to the true religion preſently profeſſed, were fered directly in their awne perſons, or covertlie firectlie by any others in their names, and to their ; to enjoy the poſſeſſion of their lands, rents, and es," which "were to be meddled with, intromit- h, and uplifted to his majeſtie's uſe [f]"—were pre- om obtaining any heritable title in their perſons, om the king or ſubject ſuperior [g]—were to be iced rebelles, and apprehended by letters of horn- l caption, for the purpoſe of compelling them to the ſentence or decreet pronounced againſt them, reconcile themſelves to the kirk, and ſubmit them- o the diſcipline thereof [h]."

§ 3. NATIONAL ESTABLISHMENT.

ieſe deformities of the preſbyterian eſtabliſhment ected at the revolution.

All acts, enjoining civil pains upon ſentences of nication, were reſcinded [i]; and judges were ex- ohibited to lend their aid, for obliging any one to fore a church court, when ſummoned in a proceſs imunication [k].

Excommunication attended with no civil pain.

OLY, All acts, and proviſions of acts, againſt non-

Judges prohibited from lending their aid to church courts.

, Of the Kirk, and Policy eneral.
10, Of the Office of a agiſtrate in the Kirk.
3.
4.
71, parl. 3, 1572, c. 53.

And afterwards in the time of epiſcopacy, by the 1661, c. 25, and 1663, c. 23.

i 1690, c. 28.

k 10th Anne, c. 7, commonly called the Toleration Act.

§ 3. NATIONAL ESTABLISHMENT.

conformity, and for conformity to the church, or againſt ſeparation and diſobedience to eccleſiaſtical authority [k], were repealed. This was a complete toleration; for where there are no penal enactments, puniſhing individuals for worſhipping the Deity according to their conſciences, the principles of common law entitle them to do ſo. Nonconformity is not an offence or miſdemeanour at common law. But farther, it has been declared, that it "ſhall be free and lawful for all the ſubjects in that part of Great Britain called "Scotland, to aſſemble and meet together for divine ſervice, without any diſturbance; and to ſettle their congregations in what forms or places they ſhall think fit to "chuſe, except pariſh churches [l]." This is a charter, and legal recognition of diſſenters.

Nonconformity, penalties againſt it, aboliſhed.

Expreſs enactment in favour of diſſenters.

No teſt.

THIRDLY, The act of Charles II, parl. 3, act. 6, intitled, Act anent Religion and the Teſt was reſcinded [m]; and no other teſt was ſubſtituted in its place, excepting that all perſons bearing office in any univerſity, college, or ſchool, ſhall ſubſcribe the confeſſion of faith, and adhere to the government and diſcipline of the preſbyterian church [n]. In Scotland, a diſſenter is not diſqualified from holding any offices [o],

[k] Act 1690, c. 27, App. I. This reſciſſory act does not expreſsly repeal the perſecuting act of James VI. And the general reſciſſory clauſe is limited in theſe terms: "All other "acts, clauſes, and proviſions in acts "whatſoever made ſince the year "1661 incluſive, againſt nonconformity, or for conformity to the "church and government thereof, "as then eſtabliſhed under archbiſhops and biſhops." And the act 1690, c. 5, revives "all laws, "ſtatutes, and acts of parliament "made againſt popery and papiſts, "and for the maintenance and "preſervation of the true reformed "proteſtant religion, and for the true "church of Chriſt within this kingdom, in ſo far as they confirm the "ſame, or are made in favour thereof." Theſe penal acts have been ſince repealed; of which in the next chapter.

[l] 10 Anne, c. 7.

[m] Act 1690, c. 5.

[n] 1707, c. 7.

[o] "For the greater ſecurity of the "foreſaid proteſtant religon, and of "the worſhip, diſcipline, and government of this church, as above eſtabliſhed, her majeſty, with advice "and conſent foreſaid, ſtatutes and ordains, that the univerſities and

of St. Andrews, Glaſgow,
n, and Edinburgh, as now
:d by law, ſhall continue
his kingdom for ever. And
all time coming, no pro-
rincipals, regents, maſters,
s bearing office in any uni-
:ollege, or within this king-
capable, or be admitted or
to continue in the exerciſe
ſaid functions, but ſuch as
me and acknowledge the
vernment, in manner pre-
or to be preſcribed by the
arliament. As alſo, That
r at their admiſſions, they
ſhall acknowledge and pro-
l ſhall ſubſcribe to the fore-
ſeſſion of faith, as the con-
f their faith, and that they
actiſe and conform them-
o the worſhip preſently in
this church, and ſubmit
ves to the government and
e thereof, and never endea-
lirectly or indirectly, the
ce or ſubverſion of the
1707, c. 7.

olition of the teſt act is here
r taken notice of, along with
ion of penal ſtatutes. But unjuſt and unlawful. But, the excluſion of diſſenters from offices, is a meaſure to be weighed on the footing of expediency alone. It affects not their *perfect rights*. *All* have no right to what can be enjoyed by a *few only*. Men did not enter into ſociety that they might be generals, or judges, or members of parliament; but that their properties and lives might be protected. Under all governments, that of Athens as well as any other, certain qualifications were required for holding offices. What this criterion ſhall be, whether wealth, or age, or religious opinions, is a thing entirely diſcretionary: it is a queſtion of expediency, not of juſtice. The Scottiſh eſtabliſhment has not the ſupport of a teſt act, and it has never found any prejudice from the want of it. The Engliſh, on the contrary, has that ſecurity, and is not, on that account, guilty of perſecution or intolerance.

However many wiſe and good men diſapprove of a religious teſt, on the footing that the community have a right to the talents of all the citizens; and that it is injurious to the public and to individuals, to exclude any on

§ 3. NATIONAL ESTABLISHMENT.

wark or prerogative it has none; yet piety and good moral and all the salutary purposes of a national establishment, promotes more abundantly than heretofore.

SUCH, then, was our legal establishment when Scotland remained a separate and independent kingdom. But, by the Union, England and Scotland became one kingdom. Another question, therefore, arises, viz. had that event any effect upon the rights of the presbyterian church? or, on what footing does it stand with respect to Great Britain?

THE Scottish nation has been always noted for religious zeal. The string, therefore, most powerfully touched by the enemies of the Union, to disincline the people to it, was the supposed danger to the dignity and security of the national church, which had recently been settled with so much care at the Revolution. In order, therefore, to quiet all such apprehensions, an act was passed for securing the protestant religion, and presbyterian church government; not only ratifying the act of king William and queen Mary, and all other acts relative to the confession of faith and presbyterian church government—expressly providing and declaring, "that the foresaid true protestant religion, contained "in the above-mentioned confession of faith, with the form "and purity of worship presently in use within this church, "and its presbyterian church government and discipline, "that is to say, the government of the church by kirk ses- "sions, presbyteries, provincial synods, and general assem- "blies, all established by the foresaid acts of parliament "pursuant to the claim of right, shall remain and continue "unalterable; and that the said presbyterian government "shall be the only government of the church within the "kingdom of Scotland; .... for the greater security of the "foresaid protestant religion, and of the worship, discipline "and government of this church, as above established"—statuting and ordaining, that the professors of universities

:ant religion and presbyterian church government,
ip, and discipline, as above established; and that the
within the bounds of this church and kingdom,
ever be imposed upon or required of them in any
. . : and lastly, that, after the decease of her present
y, the sovereign succeeding to her in the royal go-
ent of the kingdom of Great Britain shall, in all
oming, at his or her accession to the crown, swear
ibscribe that they shall inviolably maintain and pre-
he foresaid settlement of the true protestant religion,
he government, discipline, worship, rights, and pri-
s of this church, as above established by the laws of
ngdom, in prosecution of the claim of right."

statute, with the addition of the test in regard to
nd colleges, was a reiteration of king William's act
ty; it was framed in reference to the Union; and,
gly, it was "ordained, that this act of parliament,
the establishment therein contained, shall be held
served, in all time coming, as a fundamental and
al condition of any treaty or union to be concluded
it the two kingdoms, without any alteration thereof,
ogation thereto, in any sort for ever; as also, that
t of parliament, and settlement therein contained,
e insert and repeated in any act of parliament that

§ 3. NATIONAL ESTABLISHMENT.

" and eſſential condition of the ſaid treaty or union in all " time coming."

IT happened, however, that in England, on the eſtabliſh ment of epiſcopacy, there were two bulwarks erected for it defence, called the corporation and teſt acts; by the forme of which [b] " no perſon can be legally elected to any offic " relating to the government of any city or corporation " unleſs within a twelvemonth before he has received th " ſacrament of the Lord's Supper, according to the rites " the church of England; and he is alſo enjoined to tak " the oaths of allegiance and ſupremacy at the ſame tim " that he takes the oath of office, or, in default of either " theſe requiſites, ſuch election ſhall be void." The othe called the teſt act [c], directs " all officers, civil and military " to take the oaths, and make the declaration againſt tra " ſubſtantiation, in any of the king's courts at Weſtminſte " or at the quarter ſeſſions, within ſix calendar months af " their admiſſion; and alſo within the ſame time to rece " the ſacrament of the Lord's Supper, according to th " uſage of the church of England, in ſome public church " immediately after divine ſervice and ſermon; and to d " liver into court a certificate thereof, ſigned by the miniſt " and church-warden; and alſo to prove the ſame by tw " credible witneſſes, upon forfeiture of 500l. and diſabili " to hold the ſaid office [d]."

AND as the king is bound, by his coronation oath, to pr ſerve the privileges of the preſbyterian church, ſo is he a bound, by his oath, to preſerve thoſe of the epiſcopali The queſtion, therefore, occurs, how far theſe obligatio are conſiſtent with each other? In Scotland, as already me tioned, there is no teſt with regard to civil or military

[b] Stat. 13 Car. II, ſt. 2, c. 1.
[c] Stat. 25 Car. II, c. 2, explained by 9 Geo. II, c. 26.
[d] Black. Vol. iv, p. 58.

an office relating to the government of an Engliſh corporation, on account of his not complying with poration act, than an epiſcopalian can for being ex- from the Scottiſh univerſities, unleſs he ſubſcribe the on of faith, and promiſe to conform to the preſbyte- rſhip; theſe two acts reſpectively relating to things did not fall under the imperial community, but re- ſtill as before; the one, Engliſh; the other, Scottiſh.

the teſt act deſerves a different conſideration, relat- offices civil and military, which are no more Engliſh rely than they are Scottiſh, but belong to the united m of Great Britain.

rs reſpect to theſe, an incorporating union neceſſarily ed a complete communication of rights. This, in- was the leaſt price that could be offered for the ſur- ing of that "which all the world hath been fighting ſince the days of Nimrod[d]," national ſovereignty and ndency. But it was not left to double conſtructions. expreſsly ſtipulated, that the ſubjects of the united m ſhould have freedom of trade and navigation, &c. communication of all other advantages. But this e connected with the other clauſe of the Union, for ſervation of the preſbyterian church government, and

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would ſeem to amount to little leſs than a contradiction and abſurdity to ſuppoſe, that theſe Scottiſh preſbyterians could not avail themſelves of this communication, till they had ſolemnly profeſſed themſelves epiſcopalians. For the teſt act was deviſed by the Engliſh parliament, not to try the laxity of men's conſciences, and to admit the unprincipled part of all ſectaries to the enjoyment of offices, but as the moſt ſolemn method that could be deviſed for excluding every one that was not a true epiſcopalian.

ANOTHER view of the ſubject ariſes from the poſitive declaration, that the Scottiſh preſbyterians were to be free from all teſts in this kingdom, inconſiſtent with the preſbyterian worſhip. This does not affect the argument touching the incorporation act; becauſe an *Engliſh* corporation or city is not in the ſenſe of this act in this kingdom. But it is not the caſe with offices in the army or navy. Theſe are offices in the kingdom of Scotland as much as they are in the kingdom of England. Relating to the united kingdom, there are offices in both kingdoms equally, and a Scottiſh preſbyterian who is excluded from them, unleſs he take the epiſcopalian teſt, is, againſt the ſenſe of that ſtipulation, ſubjected in this kingdom to a teſt, contrary to the preſbyterian worſhip.

BUT, in truth, the epiſcopalian teſt cannot ſtrike againſt Scottiſh preſbyterians, unleſs it be more extenſively conſtrued than would be allowable in regard to an act of this nature, even in a queſtion with private individuals. The teſt act was not directed againſt perſons in the ſame predicament with Scottiſh preſbyterians. It was framed "in "order the better to ſecure the eſtabliſhed church againſt "perils from nonconformiſts of all denominations, infidels "Turks, Jews, heretics, and ſectaries [c]." But a memb

[c] Blackſtone, B. iv, c. 4.

of the church of Scotland is no more a Britiſh nonconformiſt, or ſectariſt, than a member of the church of England is. Even, in this view, the teſt act does not ſeem at all to affect them. § 3. NATIONAL ESTABLISHMENT.

ACCORDINGLY, at the time of the Union, ſuch ſeems to have been the idea of the Engliſh parliament. With a view to the Union, a bill was brought in for the ſecurity of the church of England; and a queſtion was put, that "it be an inſtruction to the committee, to whom the "bill for *ſecurity of the church* was committed, that there "ſhould be inſerted in the ſaid bill, as a fundamental con-"dition of the intended Union with Scotland, particular "and expreſs words, declaring perpetual and unalterable an "act of parliament made in the 25 Car. II," &c. But this being reſolved in the negative, occaſioned a proteſt [f]. Thus the Engliſh parliament purpoſely avoided clogging the Union with any conditions about the epiſcopalian teſt.

So ſtanding this important queſtion on the general conſtruction of theſe enactments and articles of Union, there ſeems reaſon for the remark, that the Scottiſh "parliament "did not ſlightly paſs over that affair, as ſome people pre-"tended they would do, though they did not enter into the "debate of the inſufficiency, which ſome offered, as things "which tended not to amendments of the act, as it was

[f] "We conceive that this act doth "deſerve to be particularly mentioned, and not left to double conſtructions; because as it was at firſt "made to ſecure our church, then in "danger, by the concurrence of papiſts and diſſenters to deſtroy it; ſo "they have found by experience, "both in the reign of king Charles "II and of king James II, that it was "the moſt effectual means of our "preſervation, by removing from "their employments the greateſt "enemies of our church; and particularly in the reign of the late king "James II the aſſuming of a diſpenſing power, and illegal practices, "by cloſetting and corrupting the "members of parliament, were chiefly levelled againſt the teſt act." — Parliam. Hiſtory, Vol. v, p. 104.

§ 3. NATIONAL ESTABLISHMENT.

"offered, but to a rupture of the debate; for the people "who offered at the insufficiency of the act went upon this "footing, not that this overture or act was an insufficient "security, but that really the Union with England, as an "episcopal nation, was inconsistent with the safety of the "church of Scotland; and that not this act only was, but "any other act that could be made would be, insufficient to "secure the church of Scotland [g]."

[g] Defoe's History of the Union, p. 338. This affords the true explanation of the parliament of Scotland rejecting the proposal to insert a clause in these terms: "And that "they shall be capable of any office, "civil or military, and to receive "any grant, gift, or right, and to "have command or place of trust "from or under the sovereign with-"in any part of Great Britain." Accordingly, the protest drawn up by Lord Belhaven was not merely "that this act is no valid security to "the church of Scotland," but that the "church of Scotland can have "no real or solid security by any "manner of Union, by which our "claim of right is unhinged, our "parliament incorporated, and our "distinct sovereignty and independ-"ency abolished." Ibid. For this affair of the sacramental test was generally mentioned along with other proposals, obviously impracticable, as the taking away the representation of the bishops, as to which the address of the commissioners of the general assembly says, "it is contra-"ry to our own principles and cove-"nants, that any churchman should "bear civil offices, or have power in "the commonwealth." Ibid. App. No. H. x.

The same thing farther appears from the answer to that part of the address that related to the sacramental test. The address said, that "the "sacramental test being the condi-"tion of access to places of trust, and "to benefits from the crown, all of "our communion must be debarred "the same, if not in Scotland, yet "through the dominion of Britain, "which may prove of most danger-"ous consequence to this church."

The answer made to this address, by the protest of the ruling elders, some of whom were members of parliament, did not justify such ex-clusion of Scottish presbyterians; but on the contrary, proceeded on this, that the address was unnecessary, and the fears imaginary. The first ar-ticle of the address was that relative to the sacramental test; and the first article of the answer is as follows: "The commission of the general as-"sembly having already addrest to "the parliament, for securing the "doctrine, worship, discipline, and "government of this church, and "that address being read in the "house upon the 17th October last, "the parliament did thereupon de-"clare, that, before concluding, they "would take said address into their "consideration, and would do every

To worſhip God agreeably to the light of one's own ce, though contrary to the forms preſcribed by the ed church, is not an offence at common law. "The ſchiſm, as ſuch, is by no means the ſubject of tem- coercion and puniſhment[a]." At common law, religious ſocieties are, at leaſt, on a footing with ociations for innocent and lawful purpoſes.

§4. CONFORMITY, LAW OF.

Revolution, which ſettled the conſtitution, had in redreſs of religious as well as civil grievances. Re- eedom was provided for with no leſs care than ci- e Revolution gave birth to the act 1690[b], which d preſbytery, and is conſidered as the charter of nal church. But the ſame parliament[c] reſcinded "all laws for conformity." The freedom of diſ- herefore, was as early and neceſſary a fruit of the on as the eſtabliſhment of preſbytery. And queen oleration act declares it "free and lawful for all

ceſſary for ſecuring the eſtant religion and church ent preſently by law eſta- n this kingdom; which : we conceive the commiſ- y very well rely upon, is not to be doubted that ament will, in due time, : addreſs is taken into con- , make all neceſſary pro- or ſecuring our religion rch government, by law d," &c.

nner the motions about ntal teſt were allowed to . Entering into that in would not have ſatisfied oppoſers of the Union, have created irritation in and, as Defoe ſays, the wiſer heads of both countries avoid- ed, as much as poſſible, going into particulars touching religion; rather chooſing, as the Engliſh peers who diſſented complain, to leave *matters to double conſtructions*, that is, the argu- ment entire, on the general grounds already ſtated; which, now that all the heats have ſubſided, dangers are over, and ſiniſter views and inter- eſts long ago forgotten, may expect a juſt and candid conſtruction from the courts of law of either country.

[a] Blackſtone, B. iv, ch. 4, p. 53, where he ſays very plainly: "Cer- "tainly our anceſtors were wrong "in their plans of compulſion and "intolerance."

[b] C. 5, App. I.

[c] C. 28, App. I.

§ 4. CONFORMITY, LAW OF.

" ſubjects in that part of Great Britain called Scotland, " aſſemble and meet together for divine ſervice without di " turbance, and to ſettle their congregations in what town " or places they ſhall think fit to chooſe, except paril " churches [c]."

UNDER thoſe enactments, the right of proteſtant diſſent ers, as much as that of the national church itſelf, is ſtatu ory. They are not connived at and endured, but recognize and protected in their rights, though not ſtipendiary [d].

HENCE property may be validly veſted in truſtees, f behoof of any diſſenting ſect [e].

[c] 10 Anne, c. 7, § 5.

[d] This language was uſed from the bench, in the late caſe Aikman againſt Davidſon, to be afterwards taken notice of. In England, too, the ſame liberal view ſeems now to be taken of their ſituation.

Blackſtone, indeed, expoſed himſelf to ſevere animadverſion, for the view he gave of the Engliſh toleration act, as rather ſuſpending the penalties, than taking away the crime of nonconformity. But the court of king's bench adopted the more liberal view, that the toleration act removed the crime, as well as the penalty, of mere nonconformity. Lord Mansfield is ſaid to have uſed the expreſſion, that the toleration act had " eſtabliſhed the diſſenters worſhip, " rendering it not only innocent but " lawful." Furneaux's Letters to Blackſtone.

It is material to take notice, that Blackſtone founded his limited view of toleration, on the particular phraſeology of the Engliſh act, which does not affect Scotiſh diſſen He ſays, " In caſe the legiſlature h " intended to aboliſh both the cri " and the penalty, it would at o " have repealed all the laws enac " againſt nonconformiſts. But " keeps them expreſsly in force, " gainſt all Papiſts and oppugners " the Trinity, and perſons of no " ligion at all; and only exem " from their rigour ſuch ſerious fo " minded diſſenters as ſhall have ta " en the oaths, and ſubſcribed t " declaration at the ſeſſions, and h " regularly repair to ſome licen " place of religious worſhip." (A ſwer to Dr. Prieſtley.) Now, t very thing is done by our tolerat act. It reſcinds, at once, all the l againſt nonconformiſts, without t condition of taking oaths, or me ing in licenſed houſes.

[e] The ſeceders, denominated b gers and antiburgers, are a numer body of diſſenters in Scotland. T have preſbyteries and ſynods, a the model of the church of Scotl A houſe was feued and built for

§ 4. CONFORMITY, LAW OF.

HENCE in England it has been likewiſe found, that diſſenters were not liable in the fine impoſed on thoſe who decline a public office, which cannot be held without taking the ſacramental teſt [a]. So alſo in England it has been found, that Quakers refuſing to ſwear at a criminal trial are not puniſhable [b]. Epiſcopalians and papiſts were not included in the reſciſſory act 1690, c. 28: but the former have been ſince tolerated by 10 Anne, c. 7, and 32 Geo. III, c. 63; and the latter by 33 Geo. III, c. 44, if they comply with the conditions thereby required [c].

of the original members of the aſſociate ſynod. Many years thereafter, the burger ſynod, or general aſſembly of that denomination, agreed to a variation of the formula, contained in the 23d chapter of the confeſſion of faith. But the clergyman, and part of this congregation, preferred the old formula, and declined the juriſdiction of the aſſociate burgher ſynod, until the ſaid reſolution is completely reſcinded; but at the ſame time he alleged: "I conceive I have "full title and authority ſtill to exerciſe the duties of the holy miniſtry, in the place where I have been in the uſe to exerciſe thoſe duties, "for it is the reverend ſynod, and "thoſe of my congregation who adhere to them, not me, who have renounced and departed from the "faith." On the other hand, the aſſociate preſbytery, on account of this declinature, "dropped his name "from the roll, declaring that he is "no longer of our church, and that "the collegiate charge in the congregation of Perth is diſſolved."

The parties therefore were at iſſue reſpecting the property of the houſe. The court of ſeſſion, by their firſt interlocutor, found that the right of the church and premiſes was held in truſt for a ſociety of perſons who had contributed their money for the ſame; and was to be managed by the majority in point of intereſt. And this was agreeable to ſome deciſions of the court in former caſes. But, on adviſing full papers, and a hearing in preſence, the court, though much divided in opinion, ultimately found that the church was an erection for behoof of that ſociety "or congrega"tion continuing in communion with, "and ſubject to the eccleſiaſtical diſ"cipline of a body of diſſenting pro"teſtants, calling themſelves the aſſo"ciate preſbytery and ſynod of bur"ger ſeceders." This judgment interpoſed as effectually in ſupport of the authority of the ſynod, as if it had been the general aſſembly of the church of Scotland. Aikman againſt Davidſon, June 27th 1805.

[a] The chamberlain of London againſt Evans, Feb. 4th 1767. See Lord Mansfield's ſpeech, App. to Furneaux's Letters to Blackſtone, p. 265.

[b] See Vol. I, p. 244.

[c] See next Chapter.

CHAP. XV.

Offences againſt Morality and Religion.

§ 1. IN GENERAL.

I. JUSTICES of peace are entruſted with the ca checking and puniſhing thoſe immoralties whic rather conſidered as offences againſt the police and order of the community, than as indictable crimes.

§ 2. OFFENCES AGAINST MORALITY —DRUNKENNESS.

II. THE juſtices are ordained, by the general ſtatut put in execution, for the puniſhing of all perſons found of the ſin of drunkenneſs, or exceſſive drinking, eſpe under the names of healths; or haunting taverns o houſes after ten of the clock at night, or at any time o day, except in time of travel or for ordinary refreſhm as alſo, againſt the keepers of the taverns or ale-houſes ſhall ſell the drink unto them [b].

THEY are alſo to put in execution the acts of parlia

[a] Appendix I, No. 9.

[b] Ibid. p. 61. The ſtatutes regarding this crime are, 1617, c. 20, and 1661, c. 19; and the penalties ſame as in the caſe of curſin ſwearing.

§ 2. OFFENCES AGAINST MORALITY —FORNICATION.

for the puniſhing of all perſons that ſhall be found of the ſin of fornication[c]: and the penalties are to be not only from the man, but alſo from the woman, ac- g to their quality and the degree of their offence, the ithout prejudice of the other.

—BROTHELS.

England, brothels and bawdy-houſes are indictable at on law, as an offence againſt the police: and the ſame no doubt, obtains by the law of Scotland. A wife indicted and condemned along with her huſband, to lory, for keeping a bawdy-houſe; this being an offence the government of the houſe, in which the wife has ipal ſhare, and becauſe the offence is of that kind may generally be preſumed to be managed by the in- of her ſex.

—LEWDNESS.

England, it is laid down, in general, by Dr. Burn, open lewdneſs, groſsly ſcandalous, is puniſhable up- ſtment at the common law. And offenders of this e puniſhable, not only with fine and impriſonment, with ſuch infamous puniſhment as the court ſhall roper[d].

—INDECENCY.

e manner, all other behaviour which is an outrage ublic decency and decorum, may be checked and d; of which Dr. Burn gives an inſtance in the pu- t of a perſon, who, for a wager, run naked through ts of a populous town.

§ 3. OFFENCES AGAINST RELIGION —PROFANITY.

THE juſtices of peace, by the general ſtatute, are or- o put in execution all acts of parliament made for pu- all perſons whatſoever who ſhall curſe or profanely

the particular fines, ſee Ap- .60.

[d] *Voce* Lewdneſs, i, Hawk. vii, 1, 6.

§ 3. OFFENCES AGAINST RELIGION

ſwear, or ſhall be mockers or reproachers of piety or t exciſe thereof [f].

—CURSING AND SWEARING.

THE offences of curſing and ſwearing are puniſh certain pecuniary penalties, according to the offende and circumſtances [g]. "And, in caſe of inability "parties, delinquents, to pay the ſum mentioned "inſtruction, the ſaid juſtices ſhall put in executi "laws, as for corporal puniſhments, as have any pe "mentioned in them for ſuch caſes [h]."

—PROFANATION OF THE LORD'S DAY.

THE juſtices are ordained to put in execution, all parliament made againſt ſuch perſons as ſhall prof Lord's day, and require or levy the penalties there tained [i]. Theſe ſtatutes are numerous [k], our legiſlatu anxious to enforce the due obſervance of the Sabbath out which, the principles of religion and morality wo be obliterated from the minds of the people [l]. The of fairs or markets, all buying and ſelling, working, or playing, reſort to ale-houſes or taverns, ſalmon going of ſalt-pans, mills, or kilns, hiring of reapers, general, all uſe of ordinary labour, employment, o upon that day, are prohibited under pecuniary pena be diſpoſed of as in the caſe of the offences befo tioned [m].

[f] Appendix i, p. 59.

[g] Ibid. 59 and 60, and ſtat. 1661, c. 19.

[h] Ibid. i, p. 60. The corporal pains pointed out for that caſe, by the older ſtatutes 1551, c. 16, and 1581, c. 103, are chiefly thoſe of impriſonment, and ſetting in the jugs or ſtocks, or, in caſe of great obſtinacy, baniſhment.—Hume, Vol. ii, p. 528.

[i] 1661, § 31; App. i, p. 60.

[k] 1503, c. 83; 1579, c. 70; 1592, c. 124; 1593, c. 163; 159 1661, c. 18; 1663, c. 19.

[l] See Warburton's Work and Dr. Paley's Moral an Philoſophy, B. v, c. 7; obſervation of the Sabbath i be a poſitive, not a natural at the ſame time of the la ance in a political as well a gious and moral point of

[m] The lateſt of theſe a 1661, c. 18, king Charles

§ 3. OFFENCES AGAINST RELIGION —BLASPHEMY.

PHEMY is deſcribed by civilians to be *omne convitumelia vel maledictum in Dei nomen prolatum; or, eo pugnantia cum ejus natura et ſanctitate, cum conet velut in contumeliam ejus proferuntur*[a]: or uttering things againſt God, his "Being, Attributes, or re, in a ſcoffing and railing manner, out of a achful diſpoſition in the ſpeaker, and, as it were, paſſion againſt the Almighty, rather than with any uſe of propagating the irreverent opinion[b]." This, the manner in which it is deſcribed by our ſtatute, . 21[c], by which it is ordained, "that whoſoever fter, not being diſtracted in his wits, ſhall rail upon, rſe God, or any of the perſons of the bleſſed Trinity, be proceeſſed before the chief juſtice, and, being l guilty, ſhall be puniſhed with death."

What is it? Reproachful diſpoſition eſſential to the crime.

, diabolical crime is triable before the chief juſtice, the high court of juſticiary. Juſtices of peace, and idicatories, have no juriſdiction touching it, except minary matters of arreſt, precognition, &c. It may rked, however, that, in the ſtatute, the exception of ion is expreſsly mentioned; though ſuch ſtate of on the common principles of law, would excuſe in

the following penalties, viz. m of 20l. Scots for the going ilk pan, miln or kiln, on the r, to be paid by the heretors ſſors thereof; and the ſum for ilk ſhearer and ſiſher of l on the ſaid day, the one reof to be paid by the hirers ducers, and the other half perſons hired; and the ſaid 10l. for every other profanf the ſaid day. And which d penalties are to be uplifted and diſpoſed of in manner contained in the act, and inſtructions anent the juſtices of peace, and if the party offender be not able to pay the penalties foreſaid, then to be exemplarly puniſhed in his body according to the merit of his fault."

[a] Voet. Comm. in tit. ad Leg. Jul. Maj. No. 1.

[b] Hume, Criminal Law, Vol. ii, p. 514.

[c] Cha. II, parl. 1.

§ 3. OFFENCES AGAINST RELIGION —BLASPHEMY.

the caſe of any crime. This, therefore, is a humane the judge, to pay particular attention to the ſtate of the pannel accuſed of blaſphemy; that being a crim a man in his right ſenſes can ſcarcely be ſuppoſed ca committing.

UNDER the ſame general term of blaſphemy, o fences, differing not only from blaſphemy, properly ed, which we have already conſidered, but likewiſe fr other, are puniſhable by another clauſe of the ſame by which it is ordained, that "whoſoever hereaft

Denying God,

"deny God, or any of the perſons of the bleſſed "and obſtinately continue therein, ſhall be proceſ

or the Trinity.

"being found guilty, that they be puniſhed with Theſe offences are not puniſhable capitally, unleſs

Obſtinately perſiſting therein.

obſtinately perſiſted in; that is, on the third convic it is explained by the ſubſequent ſtatute 1695, c. 11 puniſhes the firſt offence with impriſonment and pub faction, the ſecond with a fine, and the third with And it deſcribes the offence as including all "whoe "after ſhall in their writing or diſcourſe, deny, im "quarrel, argue, or reaſon, againſt the Being of "any of the perſons of the bleſſed Trinity, or the a "of the Holy Scriptures of the Old and New Teſt "or the providence of God, in the government "world."

d The act 1695 provides, "that "ſuch perſons ſhall, for the firſt of- "fence, be puniſhed with impriſon- "ment, ay and until they give pub- "lic ſatisfaction, in ſackcloth, to the "congregation within which the "ſcandal was committed. And, for "the ſecond fault, the delinquent "ſhall be fined in an year's valued "rent of his real eſtate, and the "twentieth part of his free perſonal "eſtate, (the equal half "fines are to be applied to "the pariſh within which "ſhall happen to be comm "the other half to the "former), beſides his bei "ſoned ay and while he a "ſatisfaction *ut ſupra*. A "third fault, he ſhall be p "death, as an obſtinat bla

uch offences are not juſtly puniſhable *foro humano*; " it is not for the puniſhment of thoſe who are not irch communion with the magiſtrate[f], that governors nt," but " for the puniſhment of evil doers[g];" that

offences, though here claſſ- r, muſt be admitted to be diſſimilar. Thus atheiſm the root of civil ſociety. t, therefore, ought not to ed, is admitted even by Locke himſelf, the cham- eration. " Thoſe are not o be tolerated who deny ig of a God. Promiſes, ts, and oaths, which are ds of human ſociety, can hold upon an atheiſt. The away of God, though but i thought, diſſolves all." ol. ii, p. 262, folio edit. aſoning would ſeem to go i of not excluding even rom the benefit of toler- perſecution ſeems juſt as to make a man a theiſt, as im a Chriſtian or an epiſ- The truth is, the great wards each other, wherein he moſt illuſtriouſly ſucceeded. This was the firſt great point to be gained. And neceſſary, certainly, it was not, nor perhaps prudent, for Mr. Locke to render ſuch ſucceſs more difficult by at once including atheiſts alſo in his toleration. Theſe were ſo far from being a numerous body, that it has often been doubted whether it be poſſible to baniſh the belief of a God from the human mind; ſo ſtrongly founded is it in the principles of our nature, and the moſt obvious deduc- tions of reaſon.

But how far the principles of toler- ation were from being generally un- derſtood in the time of Mr. Locke, appears ſtrikingly from his celebrated letters on toleration; where he em- ploys the utmoſt ſtrength of reaſon in the formal demonſtration of many propoſitions, appearing in theſe days

§ 3. OFFENCES AGAINST RELIGION —ATHEISM —INFIDELITY —HERESY.

is, thoſe who injure others, in their *civil intereſts*, " " liberty, health, and indolency of body;" or " in th " ſeſſion of outward things, ſuch as money, lands, h " furniture, and the like . . . for the procuring, proſe " and advancing," which alone the commonwealth conſtituted [h]. " The ſin of ſchiſm, as ſuch, is by no " the object of temporal coercion and puniſhment [i]." " perſecution for diverſity of opinions, however ridi " or abſurd they may be, is contrary to every princi " ſound policy and civil freedom [k]."

THIS ſtatute, however, is no diminution of the m fame of king William, who underſtood and loved rel liberty better than his ſubjects did. But a previous ſt redounding more to the credit of the ſame parliament already given the death-blow to religious perſecutio depriving the ſentences of church courts of all civil or conſequences [l].

THE ſtatutory puniſhments, therefore, cannot follo ſentence of a church judicatory convicting a man of a ical or heretical opinions; which are no longer puni as offences againſt religion or the Supreme Being ſuch of them as are particularly ſpecified in the two utes are thereby tranſplanted from the ſpiritual to the poral code, and adopted as offences againſt civil ſo wherefore, the ſtatute itſelf expreſsly confines the nizance thereof to the temporal courts; of the c crime to the court of juſticiary, and of the arbitra fences to judges ordinary. This affords a ſecurity a any pernicious conſequences from the ſtatute; thoſe

h Locke, Vol. ii, p. 244.
i Blackſtone, B. iv, c. 4, p. 41.
k Ibid. p. 52.
l 1690, c. 28.

§ 3. OFFENCES AGAINST RELIGION —ATHEISM —INFIDELITY —HERESY.

s having never ſhewn any inclination to inflict any nent for ſceptical, heretical, or even atheiſtical opi- upon men conducting themſelves otherwiſe inof- y as members of civil ſociety. Accordingly, though, ce the date of the ſtatutes, hereſy and infidelity have lking abroad as much as ever, yet theſe penal enact- re not reſorted to. If their *dead letter* diſfigure our book, yet, in fact, toleration is completely enjoyed to be reaſonable; the protection of Chriſtianity being ntruſted to its natural bulwarks, reaſon and erudi- True religion, at firſt, made its way in the world in pains and penalties, and it will always be able to n its ground without their aid.

E chapters may be concluded with the regulations g certain offences, rather political than either re- or moral, as directly affecting the civil government han either religion or morality. The epiſcopalians, dy mentioned, are tolerated only under certain con- in caſe of not complying wherewith, they are liable in penalties. Thus: for officiating as a paſtor or in any epiſcopal chapel or meeting-houſe [a], without the oaths and articles required by the 32 Geo. III, nd producing certificates thereof [b]; or without pray-

: is, where five perſons, or, welling-houſe, five beſides y are preſent, 19 Geo. II,

ſtatute is entitled, "An act ting relief to paſtors, mi- and lay perſons of the epiſ- mmunion in Scotland," on ive that they are now well to his majeſty's perſon, fa- government; it therefore much of the ſtatutes 10 Anne, c. 7; 5 Geo. I, c. 29; and 19 Geo. II, c. 38; and 21 Geo. II, c. 34; as "relate to the impoſing any pen- "alties or diſabilities on any perſon "or perſons, for or on account of his "or their officiating at any ſuch cha- "pel or meeting-houſe.

"2, Provided always, That every "perſon who ſhall exerciſe the func- "tion of a paſtor or miniſter in any "epiſcopal chapel, meeting-houſe, or "congregation in Scotland, ſhall,

§ 3. OFFENCES AGAINST RELIGION —ATHEISM —INFIDELITY —HERESY.

ing for the king by name, his "majeſty's heirs and ſucceſ-
"ſors, and the royal family, in the ſame form of words

"within ſix months, to be reckoned
"from and after the firſt day of July
"in this preſent year of our Lord
"one thouſand ſeven hundred and
"ninety-two, or at ſome other time
"previous to his exerciſing the ſaid
"function, take and ſubſcribe the
"oaths of *allegiance*, *abjuration*, and
"*aſſurance*, in ſuch manner as all of-
"ficers, civil and military, in Scot-
"land, are now by law obliged to
"take and ſubſcribe the ſame, and
"ſhall alſo ſubſcribe, at the ſame
"time and place, a *declaration of his*
"*aſſent* to the thirty-nine articles of
"the church of England, as contained
"in the act paſſed in the thirteenth
"year of the reign of queen Eliza-
"beth, in the words following; vide-
"licet:

"I A. B. paſtor of a congregation
"of perſons in the epiſcopal commu-
"nion in Scotland, meeting for di-
"vine worſhip at
"in the county of
"do willingly and *ex animo* ſubſcribe
"to the book of articles of religion
"agreed upon by the archbiſhops and
"biſhops of both provinces of the
"realm of England, and the whole
"clergy thereof, in the convocation
"holden at London in the year of
"our Lord one thouſand five hun-
"dred and ſixty two; and I do ac-
"knowledge all and every the arti-
"cles therein contained, being in
"number thirty-nine, beſides the ra-
"tification, to be agreeable to the
"word of God.

"3, Provided alſo, That ever
"perſon who now does or ſhall hold
"after exerciſe the function of a pa
"tor or miniſter of any epiſcop
"chapel or meeting-houſe in Sco
"land, ſhall, and he is hereby requi
"ed, within ſix months, to be ta
"koned from and after the firſt d
"of July in this preſent year of
"thouſand ſeven hundred and ninet
"two, or at ſome time before h
"exerciſing the ſaid function, to pr
"duce to the clerk of the ſhi
"ſtewartry, or borough where h
"meeting-houſe is ſituated, a certi
"cate from the proper officer of
"having qualified himſelf, by tak
"and ſubſcribing the ſaid oaths, a
"a certificate from ſuch officer
"his having ſubſcribed to the
"articles above mentioned; of wh
"reſpective certificates the clerk
"forthwith make an entry in
"book appointed for keeping a
"or regiſter of the meeting-ho
"within that juriſdiction, which
"try ſhall expreſs the name of
"miniſter whom the ſaid certific
"concern, and the ſituation and
"ſcription of the meeting-ho
"where he officiates, or ſhall
"ciate, as miniſter or paſtor; a
"of which entries ſhall likewiſe
"tranſmitted by the ſaid clerk to
"clerk of each houſe of parliam
"to be laid before the ſaid ho
"reſpectively at their next meeti
"And the ſaid clerk of ſuch
"ſtewartry, or borough, ſhall
"wiſe deliver two atteſted copies

ty to the informer, and the other to the poor of the ·····
here the offence is committed; and, for the ſecond,
der ſhall be "declared incapable of officiating as
or miniſter of any ſuch epiſcopal chapel during the
of three years [c]." For being preſent twice in the
r at divine ſervice in any epiſcopal chapel or meet-
: in Scotland, where the royal family are not prayed
firſt offence is five pounds ſterling, one moiety to

he ſaid certificates to ſuch
miniſter, one copy of each
certificates to be by him
he outſide of the meeting-
ere he officiates, or ſhall
on or near the door there-
the other in ſome conſpi-
ace within ſuch meeting-
reach and every of which
tioned copies, the ſum of
ſterling ſhall be paid, and
".

o. III, c. 63. Farther, by
7, "If any paſtor or mi-
any epiſcopal chapel or
houſe in Scotland ſhall of-
ny of the premiſes herein-
aentioned, ſuch paſtor or
ſo offending ſhall be in-
of voting in any election
aber of parliament for any
borough in that part of
ritain called Scotland, or

"8, Provided always, That every
"aſſembly of perſons for religious
"worſhip in any ſuch epiſcopal cha-
"pel or meeting houſe as aforeſaid,
"ſhall be held with doors not lock-
"ed, barred, bolted, or otherwiſe
"faſtened during ſuch aſſembly.

"9, Provided alſo, That no perſon
"exerciſing the function, or aſſum-
"ing the office and character of a
"paſtor, or miniſter of any order, in
"the epiſcopal communion in Scot-
"land as aforeſaid, ſhall be capable
"of taking any benefice, curacy, or
"other ſpiritual promotion, within
"that part of Great Britain called
"England, the dominion of Wales,
"or town of Berwick upon Tweed,
"or of officiating in any church or
"chapel within the ſame, where the
"liturgy of the church of England,
"as now by law eſtabliſhed, is uſed,
"unleſs he ſhall have been lawfully

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the uſe of his majeſty, and the other moiety to the informer; and the offender ſhall ſuffer "impriſonment for the "ſpace of ſix months, or until the ſame be paid," and for the ſecond offence, impriſonment for two years[a].

EVERY peer ſo offending, by being twice preſent within one year at divine ſervice, in any epiſcopal meeting or congregation in Scotland where the royal family is not prayed for, ſhall be incapable "of being elected one of the ſixteen "peers to ſit and vote in the houſe of peers in the parlia"ment of Great Britain, or of voting in the election of any "of the ſaid ſixteen peers[b]" "all perſons ſo offending, "being preſent at ſuch meeting-houſes twice in one year, "ſhall be diſqualified from voting, or being elected for a "member of parliament for any ſhire or burgh in Scotland, "or a deacon of crafts within burgh, or of a collector or clerk "of the land tax or ſupply[c]." Every proſecution muſt

[a] § 10.

[b] 32 Geo. III, c. 63, § 12. And it is farther "competent for any peer of Scotland, preſent at the election of the ſaid ſixteen peers, or of any of them, to make this objection, and to prove the ſame by a witneſs or witneſſes, upon oath; or by referring it to the oath of the peer ſo objected to; which oath the lord clerk regiſter, or either of the two clerks of ſeſſion appointed by him to officiate in his name at ſuch election of ſixteen peers, or of any of them, is hereby empowered to adminiſter; and in caſe the ſame ſhall be proved, or the peer ſo objected to ſhall admit the fact, or refuſe to depoſe concerning it, he ſhall be and is hereby diſqualified from, and rendered incapable of voting, or being choſen at any election as aforeſaid, but ſuch admiſſion or confeſſion, upon oath or otherways, ſo made at ſuch meeting aſſembled for any ſuch election, ſhall not be made uſe of, or given in evidence againſt any ſuch peer, upon any proſecution for any penalty inflicted by this or any former act of parliament."

[c] 32 Geo. III, c. 63, § 13. "it ſhall be competent for any candidate, or member of the meeting aſſembled for any ſuch election, to make this objection, and to prove the ſame by a witneſs or witneſſes upon oath, or by referring it to the oath of the perſon objected to, which oath the preſes or clerk of ſuch meeting is hereby empowered to adminiſter; and in caſe the ſame ſhall

commenced within the ſpace of 12 months after ſuch offence is committed [d]. § 3. OFFENCES AGAINST RELIGION —EPISCOPACY.

EPISCOPAL miniſters, not qualified under the ſaid ſtatutes, are alſo liable under the Scottiſh act, if they marry or baptiſe, as has been already mentioned.

IF any perſon ſhall willingly and of purpoſe, maliciouſly, or contemptuouſly come into any congregation of religious worſhip permitted by this act, and "diſturb the ſame, or give any diſturbance to the congregation at the doors or windows, or miſuſe any miniſter of ſuch congregation, ſuch perſon upon proof thereof before two juſtices of peace, by two witneſſes, ſhall find ſureties to be bound by recognizance in 50l. for his appearance at the next quarter ſeſſions, or before the court of juſticiary, or other judge competent, and in default of ſureties, ſhall be committed to priſon, and, upon conviction of the offence, ſhall forfeit 100l. one moiety to the informer, the other to be diſpoſed of for the uſe of the poor of the pariſh where ſuch offence ſhall be committed [e]." —DISTURBING A QUALIFIED CHAPEL. Two juſtices. Recognizances. Penalty.

BUT it is ſpecially provided, "that the aſſembly for religious worſhip in the epiſcopal meetings be held with doors not locked, barred, or bolted; and that nothing herein contained ſhall exempt any perſons frequenting the epiſcopal Muſt meet with open doors.

proved, or the perſon ſo objected to ſhall admit the fact, or refuſe to depoſe concerning it, he ſhall be and is hereby diſqualified from and rendered incapable of voting, or being choſen at any ſuch election as aforeſaid; and ſuch admiſſion or confeſſion upon oath or otherwiſe ſo made at ſuch meeting aſſembled for any ſuch election, ſhall not be made uſe of, or given in evidence againſt any ſuch perſon, upon any proſecution for any penalty inflicted by this or any former act of parliament."

[d] 32 Geo. III, c. 63, § 11.

[e] § 9.

§ 3. OFFENCES AGAINST RELIGION

congregations from paying tithes, or other parochial duties to the church or miniſter of the pariſh in which they re ſide [b]."

—POPERY.

FROM the hiſtory of the Reformation, as well as of the R volution, it is eaſy to ſee how a terror of popery came to incorporated into our laws and conſtitution. Under a agreeable and faſcinating exterior, it had been felt, by o forefathers, to be inconſiſtent with the well being of ſocie ſubverſive at once of the morals of the people, and of t eſtabliſhed laws and government. Severe ſtatutes we therefore enacted againſt papiſts, as a political party, hoſti to the ſtate, and were continued againſt them, as being re dered, by their religion, incapable to give the magiſtrate a reaſonable ſecurity for their obedience. Hence, perſons r conciled to the pope or ſee of Rome; defending the pop juriſdiction "in this realm, if a perſon be twice convict thereof; popiſh prieſts, born within the dominions of t crown, coming over hither from beyond ſeas; or tar ing here three days without conformity to the church [c]; profeſſed jeſuits, or ſeminary prieſts, apprehended with this realm, and all wilful hearers of maſs, and concealers the ſame, were capitally puniſhable [d]. The "importi vending, or diſperſing of popiſh books; the endeavouring perſuade any perſon to decline from the true faith; the ſetting of any jeſuit, ſeminary prieſt, or trafficking pap (which laſt alſo was treaſon at one time;) are puniſ able with fine, baniſhment, or eſcheat of moveables; a rewards are offered to ſuch as ſhall inform againſt de

Capitally puniſhable.

Leſſer puniſhments.

[b] 10 Anne c. 7, § 4.

[c] See Vol. I, p. 342.

[d] 1587, c. 24; 1592, c. 122; 1594, c. 196; 1600, c. 18; 1607, c. 1; 1609, c. 5. Hence, as late as the 11th March 1755, the petition of Alexander M'Donald, for bail, w refuſed, on the ground that the ſ ing of maſs, which is confeſſed in petition, is not within the privil of that relief. (Hume Crim. L Vol. II, p. 536.

quents [a]. Theſe penal enactments were all ratified by the act 1703, c. 3; and it was farther provided, that any perſon who laboured under the repute of being a jeſuit, prieſt, or traſficking prieſt, or who was proved to have changed his name or ſurname, might be called upon to purge himſelf of the ſuſpicion of popery, by taking the formula preſcribed by the ſtatute; and his refuſal ſo to do was a ſufficient warrant to the privy council; and now, under the 7th Anne, c. 14, to the court of juſticiary, for baniſhing him forth of the realm, never to return. § 3. OFFEN AGAIN RELIG —FOR

PROFESSED or known papiſts were debarred from granting gratuitous deeds to the prejudice of their heirs [b]; and alſo from purchaſing by voluntary diſpoſition any heritable right, either in their own name or that of third perſons [c].

BUT, by the ſtatute 33 Geo. III, c. 44, the pains, penalties, diſabilities, and reſtrictions, are removed from thoſe roman catholics who are willing to comply with that ſtatute, by taking an oath agreeable to the formula therein preſcribed, which goes not to the renunciation of the popiſh religion, but of ſuch popiſh doctrines as appear leſs conſiſtent with the well being of ſociety and civil liberty. In taking this oath, they are relieved from all diſabilities impoſed or ratified by the act of the 8 and 9 of the firſt parliament of king William, as fully and effectually, to all intents and purpoſes whatſoever, as if ſuch perſons had actually made the renunciation of popery ordained by that ſtate, and according to its formula [d]. Remo the pa and di lities.

[a] 1587, c. 24; 1592, c. 122; 1600, c. 8; 1700, c. 3.
[b] 1695, c. 26.
[c] 1700, c. 3.
[d] Formula required to be taken by the ſtat. 33 Geo. III, c. 44, by catholics, which relieves them from all diſabilities impoſed by the acts of William, &c.
"I A. B. do hereby declare, that I "do profeſs the Roman catholic reli- "gion: I A. B. do ſincerely promiſe

§ 3. OFFENCES AGAINST RELIGION —POPERY.

THIS oath may be taken by every perſon "profe
Roman catholic religion, within that part of Grea

" and ſwear, that I will be faithful
" and bear true allegiance to his ma-
" jeſty king George the third, and
" him will defend, to the utmoſt of
" my power againſt all conſpiracies
" and attempts whatever, that ſhall
" be made againſt his perſon, crown,
" or dignity; and I will do my utmoſt
" endeavour to diſcloſe and make
" known to his majeſty, his heirs and
" ſucceſſors, all treaſons and traitorous
" conſpiracies which may be formed
" againſt him or them: And I do
" faithfully promiſe to maintain, ſup-
" port and defend, to the utmoſt of
" my power, the ſucceſſion of the
" crown; which ſucceſſion, by an act,
" (intitled 'an act for the further li-
" mitation of the crown, and better
" ſecuring the rights and liberties of
" the ſubject,') is, and ſtands limited
" to the princeſs Sophia, electreſs and
" ducheſs dowager of Hanover, and
" the heirs of her body, being pro-
" teſtants; hereby utterly renouncing
" and abjuring any obedience or alle-
" giance unto any other perſon claim-
" ing or pretending a right to the
" crown of theſe realms: And I do
" ſwear, that I do reject and deteſt,
" as an unchriſtian and impious poſi-
" tion, that it is lawful to murder, or
" deſtroy any perſon or perſons what-
" ever, for or under pretence of their
" being heretics or infidels; and alſo
" that unchriſtian and impious prin-
" ciple, that faith is not to be kept
" with heretics or infidels: And I
" further declare, that it is not an
" article of my faith, and
" renounce, reject, and
" opinion, that princes e
" cated by the pope and
" any authority whatſoev
" depoſed or murdered b
" jects, or any perſon v
" and I do promiſe, that
" hold, maintain, or abe
" opinion, or any other o
" trary to what is expre
" declaration: And I do c
" I do not believe that
" Rome, or any other for
" prelate, ſtate, or potent
" ought to have, any
" civil juriſdiction, powe
" ity, or pre-eminence, di
" directly, within this rea
" do ſolemnly, in the preſ
" profeſs, teſtify, and de
" do make this declaratio
" part thereof, in the pla
" nary ſenſe of the words
" without any evaſion, e
" or mental reſervatio
" and without any diſp
" ready granted by the
" authority of the ſee o
" any perſon whatever,
" thinking that I am, or
" quitted before God or
" ſolved of this declarat
" part thereof, although
" any other perſon, or aut
" ſoever, ſhall diſpenſe w
" the ſame, and declare
" null or void. So help

alled Scotland, being of the age of fifteen years and upards, before the ſheriff, or ſtewart-depute or ſubſtitute of he ſhire or ſtewartry, or before any two or more juſtices of e peace for the county, ſhire, or ſtewardry, where the party all reſide:" and the ſaid officers are directed within thirty ys after the laſt day of December every year, "to deliver to the office of the ſheriff-clerk of the county or ſtewartry, which the party ſhall have taken the ſaid oath, a true and rect liſt of the perſons who ſhall in the preceding year e taken the ſaid oath of *allegiance*, *abjuration*, and *deration*, before them, in manner aforeſaid; and that, in ry ſuch liſt, the quality, condition, title, and place of de, of each perſon who ſhall have taken and ſubſcribed ſaid oath of allegiance, abjuration, and declaration, with- the preceding year, ſhall be fully and clearly expreſſed, l ſuch officers ſhall reſpectively give to any perſon who ll take and ſubſcribe the ſaid *oath*, *abjuration*, and *declar-n*, at the time of the taking and ſubſcribing thereof, or any other time or times, until the liſt or regiſter ſhall have en delivered or tranſmitted to the ſheriff-clerk's office, a ll certificate of his or her having taken the ſaid oath, and the day on which the ſame ſhall have been taken; for ich certificate there ſhall be paid no greater fee or reward an one ſhilling ſterling, and every ſuch certificate ſhall be ned by the officer giving the ſame, and ſhall be granted on the ſame terms to any other perſon or perſons who ll demand the ſame, and, every ſuch certificate, being ſo ned, ſhall be evidence of the taking ſuch oath in all courts juſtice within that part of Great Britain called Scotland, and for all intents and purpoſes whatſoever[d]." Sheriff- rks are to make entries of liſts delivered them, which may inſpected, and copies required on payment of one ſhilling ling for every entry, which ſhall be paid the clerks for

§ 3. OFFENCES AGAINST RELIGION —POPERY.

Who may take the oath.

[d] 33 Geo. III, c. 44, § 4.

§ 3. OFFENCES AGAINST RELIGION —POPERY.

their trouble in keeping the ſaid books. Office-copi entries to be evidence [e].

THE ſtatute, however, provides, that "nothing i ſhall extend to enable any perſon profeſſing the Rom lic religion in Scotland, to be governor, chaplain, pe teacher, tutor or curator, chamberlain or factor, to or children of proteſtant parents, or to be otherwiſe ed in their education, or the truſt or management affairs, or to be ſchoolmaſter, profeſſor, or public t any ſcience to any perſon or perſons whomſoeve that part of the kingdom of Great Britain called Sc And Roman catholics cannot ſit in either houſe ment, or vote at an election of a member of parl

[e] Ibid. § 6.

[f] Ibid. § 7.

This act (in § 1) takes notice of the ſtatute that had been paſſed for England, 31 Geo. III, c. 32; and then narrates that it is now found expedient that one common form of oath, abjuration, and declaration, ſhall be taken and ſubſcribed by Roman catholics throughout the whole united kingdom of Great Britain; and "that "ſimilar advantages ſhall be annexed "to the taking and ſubſcribing the "ſame:" therefore it relieves them from the penalties contained in the act of William.... In the Engliſh act, it is expreſsly provided that no religious order ſhall be eſtabliſhed; and every endowment of a ſchool or college by a Roman catholic ſhall ſtill be ſuperſtitious and unlawful. No ſuch clauſe is in the Scottiſh act reſpecting religious orders.

[g] By the 22d article of the treaty of Union, it is *inter alia* provided, that the 16 peers and 45 men houſe of commons for Sc named and choſen in ſuch by a ſubſequent act in ſeſſion of parliament in S be ſettled; which act is clared to be as valid as part of and ingroſſed in t ty." And, in purſuance o in the treaty of Union, t c. 8, was paſſed in the la the parliament of Scotlan titled,—"act ſettling the electing the 16 peers a moners, to repreſent Scot parliament of Great Bri *inter alia* contains the follo "It is always hereby ex vided and declared, that capable to elect or be elec of the ſaid eſtates, but fi years of age complete, and excluding all papiſts, or w pected as ſuch, being requ to ſwear and ſubſcribe

§ 3
OFFER
AGAIN
RELIG
—SON

lusion that appears, indeed, to be an unavoidable con-
ice of thoſe leading principles which are interwoven
he whole ſyſtem of our laws and civil government, as
hed at the Revolution.

plan of a new *formula*, containing poſitive profeſſions
lty to the preſent government, has not been reſorted
ivour of the Scottiſh epiſcopalians, whoſe miniſters
uired to take the oath of abjuration, as well as of al-
e and aſſurance. But this they cannot do without a
tion of their principles. The conſequence is, that

l in the 3d act made in the
th ſeſſions of king William's
nt, intitled, 'act for prevent-
th of popery.' "

rmula is as follows:

do ſincerely
heart, profeſs and declare
d, who ſearcheth the heart,
deny, diſown, and abhor
ets and doctrines of the papal
church, viz. the ſupremacy
ope, and biſhop of Rome,
aſtors of the catholic church,
r and authority over kings,
nd ſtates, and the infallibility
pretends to, either without,
general council, his power
ſing and pardoning, the doc-
tranſubſtantiation, and the
preſence, with the commu-
hout the cup in the ſacra-
he Lord's ſupper, the ador-
ſacrifice profeſſed and prac-
e popiſh church in the maſs,
ation of angels and ſaints,
hipping of images, croſſes,
s, the doctrine of ſupererо-
ıdulgences, and purgatory,
ſervice and worſhip in an
unknown tongue: All which tenets and doctrines of the ſaid church, I believe to be contrary to, and inconſiſtent with the written word of God; and I do from my heart deny, diſown, and diſclaim the ſaid doctrines and tenets of the church of Rome, as in the preſence of God, without any equivocation, or mental reſervation, but according to the known and plain meaning of the words as to me offered and propoſed. So help me God."

Mr. Wight ſays, "it may be doubted, however, if the freeholders can ſtrike a perſon off the roll on his refuſing to take the formula. No ſuch power is given by any ſtatute; and it may be thought a ſufficient ſecurity that this teſt of his religious profeſſion can be put to him every time he attends and offers to vote." (Inquiry, B. iii, c. 3, p. 269.) But, in the caſe of James Fergusſon, eſq. againſt W. Glendonwyne, eſq. 1802, February, it ſeemed to be the opinion of the court that this was a miſtake into which that eminent lawyer had fallen."

§ 3. OFFENCES AGAINST RELIGION —POPERY.

in practice theſe oaths are not taken: the late enactm far as reſpects theſe oaths, adding one more to t of thoſe which lie a dead letter on the ſtatute book. great relief the ſtatute afforded this ſect was, by limiti pains and diſabilities touching lay-members and hea the ſingle caſe of the miniſter omitting to pray for th family.

CHAP. XVI.

Gaming.

§ 1. AT COMMON LAW.

WAGERS and game debts are, in our law, arranged under the head of *pacta illicita*, unlawful covenants [a],

[a] *Pacta illicita* are various. Thus: " the rule of law is clear, *Turpiter fa-*
rſon granted an heritable bond " *cit quod ſit meretrix, non turpiter acci-*
nuity to another man's wife " *pit quum ſit meretrix.* For the daugh-
ol. ſterling, as alſo a like bond, " ter it was pleaded, The ſuppoſed
n annuity of 30l. to a daughter " *turpis cauſa* cannot apply to her.
: ſame woman, procreated, as " Suppoſing her the daughter of the
ſuppoſed, between her and the " granter, it was not only not unlaw-
er. Upon the granter's death, " ful in him to provide for her, but
:ir being purſued for payment " he was under an obligation to do
:ſe annuities, brough a reduc- " it. Replied, That as the woman
ſ the bond, as being granted " lived in open adultery with the
adulterii, and therefore avoid- " granter, there could be no other
Anſwered for the mother, " cauſe of the deed; and there is no
ond was not given as an in- " differ.nce between a previous cor-
ıent to her to leave her huſ- " rupt bargain and a reward given
, for it was granted long after " *ex poſt facto.* The lords found, That
d left him, and probably with " no action lay upon the bond to the
r of putting an end to their " mother, as granted *ob turpem cau-*
nal co::nection, which is a " *ſam*; but ſuſtained action on that
ırious cauſe. At any rate, " granted to the daughter. June

§ I. AT COMMON LAW.

such as money ſtipulated for procuring an office [b]; or or huſband [c].

Engliſh common law.

Wagers ſuſtained.

Does not conſider them *ſponſiones ludicræ.*

IN England, "wagers in general, by the common "were lawful contracts; and all wagers may ſtill "covered in a court of juſtice, which are not made "games, or which are not ſuch as are likely to diſtu "public peace, or to encourage immorality, or ſuch "probably affect the intereſts, characters, and feeli "perſons not parties to the wager; or ſuch as are co "to ſound policy, or the general intereſts of the com "ity [d]."

"26, 1765, Sir William Hamilton "*contra* Mary De Gares and her "Daughter."

A man granted a bill for 500l. ſterling to his ſervant maid, with whom he cohabited. The bill bore value received. After his deceaſe, ſhe brought an action for payment thereof againſt his repreſentatives. They pleaded *turpis cauſa*. The court, under the circumſtances of the caſe, repelled the defence; but it was obſerved, that it was not meant to do any thing to the prejudice of the doctrine of *turpis cauſa*. 21ſt May 1799, M'Nab againſt Spittal.

[b] "Mrs. Dalrymple purſued Shaw "in a declarator for having it found, "That as ſhe had, through the inter- "eſt of her friends, procured him the "office of keeper of the regiſter of "ſeiſins for the county of Ayr, on "the ſtipulation, that he was to pay "to her and her children five ſixths "of the emoluments, he was bound "to fulfil that engagement. The "defender urged, it was a *pactum "contra bonos mores*, and amounted to "a ſale of a public office. The evi- "dence of the bargain wa "cient; but the defender "to a part of the purſuer's "the lords, though they "opinion that ſuch bargains "entitled to the aid of la "force them, decerned ag "defender to that amount. "1786, Dalrymple *contra* Sh

[c] Lord Fountainhall repo bate, concerning the valid premium promiſed for effect marriage, but inſtead of te reſult, ſays only, "it move "ter. 6th June 1678." indeed, reports a caſe whe bond was ſuſtained. 9th 1676. But, in a ſubſequent court were of opinion, that "fice undertaken by the p (viz. of procuring a wife fo perſon for a ſtipulated rewar "*contra bonos mores*, and alſo "that ground, and found "ſuers liable in expences. "bruary 1770, Thomſon a "againſt Mackaile." Dict. *Voce pactum illicitum.*

[d] Chriſtian's Blackſtone,

§ 1. AT COMMON LAW, Roman and Scottish law different from the English.

the Scottish law, treading in the steps of Roman lence, avoids all such specialties, refusing to inter- authority to enforce any obligation which does not m real business, but, at the very best, is mere pas- l amusement [t].

eason of this maxim in the Roman and Scottish lence is this, that, in wagers and game debts, there not the same reciprocity of profit as in those onerous

11. See also Termly Re- ii, p. 693, where the whole fully discussed; and also bridgement, v. Gaming, ch it appears, that lord and judge Buller esteem- licy of our law better, in g such transactions alto-

" Bruce and Ross laid a f 50l. respecting the time sisted election of a mem- arliament. The lords re- sultain action for the debt. uary 1787, Bruce against firmed in the house of pril 1788.

an granted bond, acknow- the receipt of a certain money, and binding himself heirs to pay 100l. sterling rt and his heirs, to be paid r he the granter, or his , should succeed to the dig- d estate of earl of Dundon- e heir of the granter's heir the heir of the granter for . The lords found the ll and void; reserving the , whether the pursuer was to repetition of the money " paid, on proving its amount. Sel. " Decis. 7th Feb. 1753, Sir Michael " Stewart against Earl of Dundon- " ald."

Wordsworth against Pettygrew, 15th May 1799. Fac. Coll. The parties laid a wager, whether a particular horse would trot 17 miles within an hour. The successful party for the amount, 50l. sterling, obtained a decree in absence against the other, who brought the question under review by suspension. The court were unanimously of opinion, that action does not lie for claims of this sort.

And, more lately, 16th Nov. 1804, Campbell against Cuming Gordon, the court thought the point quite fixed. The parties betted 100l. sterling with each other, the one affirming, that, in the course of 10 years, the 3 per cent. consolidated annuities would rise to 70l. and upwards; and the other, the contrary. A contract on stamped paper was executed and recorded. The successful party brought an action against the heir of the other. The court decided the cause in favour of the defender, and found him entitled to expences.

§ 1. AT COMMON LAW.

contracts which are enforced in civil ſociety. In theſe the advantage of the one party depends not neceſſarily on the loſs of the other. This holds, not only in buying and ſelling, even ſinking money or annuities, but likewiſe in marine or fire aſſurances. The one obtains that ſecurity, without which he could not have run the riſk of the voyage; the other, by means of the premium, is aided in the carrying on his trade of inſuring, which, though hazardous, yet afford on the whole, a likelihood of gain, from the number of veſſels that arrive ſafe exceeding thoſe that are loſt. But neither of them ſeeks the loſs of the other. On the contrary the aſſured is as well pleaſed as the underwriters, at the ſafe arrival of the ſhip. But, in wagers and gaming, the reverſe holds. The *gain* of the one party muſt, neceſſarily, be the *loſs* of the other. Each of the parties, therefore, thinks only of deſpoiling his antagoniſt, like two duelliſts, mutually aiming at each other's life [a].

No reciprocity of profit.

In lawful bargains, the profit of the one is not the loſs of the other.

In gaming the reverſe holds.

Each can gain only by the other's loſs.

ON theſe accounts, our common law is jealous of gambling, even in its faireſt and moſt concealed garb, refuſes its countenance and protection to what it conſiders as *ſpecies* of unlawful covenant [b]. Whether lotteries for ſale

[a] Pothier, Tom. III, p. 116. "Dans ce contrat (de jeu) l'une des parties ne peut y trouver l'avantage qu'elle y recherche, qu'en dépouillant l'autre: chacun des joueurs ne cherche qu'à dépouiller celui contre qui il joue, comme deux duelliſtes cherchent réciproquement à s'ôter la vie. Le contrat du groſs jeu a donc une fin contraire à la charité, et directement oppoſée aux principes de la ſociété civile, qui n'a établi les commerces et les contrats que pour que les membres de cette ſociété s'aidaſſent mutuellement et ſe rendiſſent mutuellement ſervice. Le contrat du gros jeu, conſidéré du côté de ſa fin, est donc contraire aux bonnes mœurs, comme tel, doit être proſcrit."

[b] Even in eaſtern countries, the laws do not appear more favourable to gaming, nor to claſs it in a more honourable ſociety than the Scots law does. Thus, in the chapter of education, the inſtitutes of Hindoo law ordain the firſt order to abſtain from "gaming, from diſputes, from detraction, and from falſehood,"

ing hard-ware, or other goods, are removeable as a nuiſance at common law, has not yet been decided [a]. § 1. AT COMMON LAW.

II. CONSIDERING "the manifold evils and inconveniences which enſue upon carding and dicing, and horſe races, which are now over much frequented in this country, to the great prejudice of the lieges: and becauſe honeſt men ought not to expect that any winning, had at any of the games above written, can do them good, or proſper[b]," the Scottiſh legiſlature have farther interpoſed to diſcountenance theſe practices by a poſitive enactment, the wiſdom of which is commended by lord Gardenſton, as claſhing little with thoſe delicate notions of honour and fidelity among gamesters, which are the great bar againſt the execution of ſuch laws[c]. § 2. SCOTTISH STATUTE 1621, c. 14.

In the firſt place, playing at cards and dice in any public houſe is prohibited. The penalty for this offence is inflicted on the maſter of the houſe, who incurs a fine of 40 pounds Scots for the firſt fault, and loſs of his liberties for the next. Gaming in public houſes prevented.

Sir Wm. Jones' Works, V. 1, p. 108.) and, in a ſubſequent part of the Inſtitutes on government, where there is an enumeration of the eighteen (or three ſets of) vices to be avoided, gaming again appears in very diſreputable company. (Ibid, p. 247.)

[a] The queſtion occurred in the caſe Fraſer againſt Sprott, 7th July 1780. Fraſer advertiſing a ſcheme of a lottery for diſpoſing of his goods, the procurator fiſcal of the city of Edinburgh applied to the magiſtrates for an interdict againſt him, upon the ground of ſuch lotteries being declared nuiſances by law, particularly by 27 Geo. III, c. 1 and 2. The court were clear, that, for the reaſon already mentioned, the ſtatute could not apply. But the late lord-juſtice-clerk M'Queen, and ſeveral other judges, delivered decided opinions, that it could be ſtopped as a nuiſance by the common law of Scotland. The court paſſed the bill, to try the point, but continued the interdict.

The miſtake here was, libelling upon this ſtatute in place of the former ones reſpecting private lotteries, which are ſo far not repealed.

[b] James VI, parl. 4th, 1621, c. 14.

[c] Gardenſton's MS. *voce* Gaming.

§ 2. JAMES VI, PARL. 4, 1621, c. 14. Even in a private houſe, unleſs the maſter play.

IN the ſecond place, playing, even in a private houſ is prohibited, unleſs the maſter of the family play himſe No particular penalty is ſpecified in this clauſe, and no qu tion relative thereto has ever occurred.

Only below 100 merks.

IN the third place, if any man win "any ſums of m ney, at carding or dicing, attour the ſum of an hund merks, within the ſpace of 24 hours, or gain at wag upon horſe races any ſum attour the ſaid ſum of an hund merks [c]," it is provided, that "the ſuperplus ſhall be co ſigned within 24 hours thereafter in the hands of the th ſaurer of the kirk, if it be in Edinburgh, or in the hands ſuch of the kirk ſeſſion in the country parochines as colle and diſtributes money for the poor of the ſame, to be e ployed always upon the poor of the paroche [d], where ſu winning ſhall fall out."

IN the fourth place, full power and commiſſion, to ſue the penalties, are given to the bailies and magiſtrates of roughs, the ſheriffs and juſtices of peace, in the county who are bound, by their public duty, to attend to the e cution of the ſtatute, and cannot be ſuppoſed to be bia by thoſe ideal principles of honour which might miſlead parties themſelves.

LASTLY. "In caſe the magiſtrate informed thereof fuſe to purſue for the ſame, the party informer ſhall h

[c] Scottiſh money, equal to 5l. 11s. 1⅑d.

[d] June 1775, Maxwell againſt Blair of Dunrod. Fac. Coll. At Dumfries a bet was taken, which of the parties would ride ſooneſt from that town to Kirkcudbright. The one was taken ill in the intermediate pariſh of Kelton; the other puſhed on to Kirkcudbright. The poo the town of Dumfries were f entitled to the money.

[e] The court ſuſtained the treaſurer's title to purſue unde ſtatute. Grant, Kirk-treaſurer City of Edinburgh againſt ſir Hill. Feb. 9, 1711. Fountain

againſt the ſaid magiſtrate for double the like ſum; half whereof to be given to the poor, and the other the party informer." § 2. JAMES VI, PARL. 4, 1621, c. 14.

act affords a defence in the caſe of a bond, or other nt, taken for money won at play [f]. It muſt be by writ or oath, that the document was granted for debt [g]. It was decided, "that the money loſt be-, and immediately lent back on bond, though poſſi- individual ſpecies loſt was not lent, that this alſo fell he act of parliament [h]."

IT does not ſeem neceſſary to enter into any long § 3. BRITISH STATUTES. of the multiplicity of enactments which the Britiſh book preſents upon this ſubject. Even in Eng- ey ſcarcely appear to be *in viridi obſervantia*; and are nically expreſſed in the phraſeology of the Engliſh at, whether meant to be limited to England or y few of them admit of execution in this country. er, "they have been underſtood to extend to Scot- ough of this" (ſays lord Gardenſtone) "I cannot help ning a very great doubt . . . particularly becauſe theſe are framed as much in the language and terms of laws, as the ſtatute concerning juſtices of peace, was found in the houſe of peers not to extend to *Scot-* the caſe of the *duke* of *Douglas*; and, indeed, ſome penalties in thoſe ſtatutes concerning gaming, can

Do they extend to Scotland?

Lord Gardenſtone's opinion.

a purſuit for payment of a rks bond—Alleged for the , that the money was won within the ſpace of 24 hours, as not due by the 14th act r. Anſwered, the ſaid act nly a defence againſt pay- en the money is purſued for, there is a bond of borrowed money. The lords found it relevant to prove, *ſcripto or juramento*, that the bond was granted for money loſt at play within 24 hours, to make the bond fall under the act of parliament. Harcarſe, 19th July 1688. Straiton." Dict. Vol. ii. *Voce pactum illicitum.*

[f] Ibid.

[h] Ibid.

§ 3. BRITISH STATUTES. Lord Gardenſtone's opinion of their inefficacy.

only be recovered in the court of *king's bench*. If we judg of thoſe laws by their efficacy, we have no reaſon to regr that they ſhould not be extended. It is well known, th the tranſgreſſions againſt them are very prevailing, and y we ſeldom hear of any execution upon them; and indee in my humble apprehenſion, the ſingle and ſolitary Sco law, which is above recited, has a better tendency to reſtra this practice, than all the ſevere prohibitions and penalti introduced by a multiplicity of Engliſh and Britiſh ſtatute I ſhall not, however, preſume to offer any poſitive opinio on this matter, eſpecially as I find that lord Kaimes, in h abridgement of the ſtatutes, has claſſed thoſe laws as e tending to Scotland. Lord Bankton is of the ſame opinio in his Inſtitutes [i]."

PERHAPS the truth really lies between the two opinion that is, as general enactments, theſe ſtatutes naturally ſhoul and are intended to have authority over the whole empir while, on the other hand, there is ſcarcely any one of the that does not contain clauſes which do not admit of exec tion in this country. In many of them, ſome of the claus have force in this country, while others have not.

i Lord Gardenſtone farther obſerves: "The great bar againſt execution of ſuch laws is the notion which gamblers have propagated, like a tenet of faith, among gentlemen, that loſſes of this nature are to be regarded as *debts* of *honour*. Gentlemen, therefore, will rather be ruined, even by ſharpers and pickpockets, ſo ſtrange is the influence of *ideal honour*, than be perſuaded to plead, that they are not bound in law to pay ſuch debts; far leſs can they be induced to take the advantage of penal laws againſt the aſſociates of their own extravagance, and the comp nions of their favourite pleaſu But the Scottiſh ſtatute claſhes h with thoſe delicate notions of hono and fidelity among gameſters. does not entitle the loſer, either recover the ſum he has loſt, or to f for penalties. If he take the bene of this law, he can fall under no i putation of ſordid motives, or un nerous conduct. He muſt pay t debt; but all that exceeds a v moderate ſum, muſt be applied charitable purpoſes." MS. tit. Ga ing.

§ 3. BRITISH STATUTES.

IT would be improper, therefore, to paſs them over altogether.

THE ſtatute 9 Anne, c. 14, enacts, that all bonds, bills, and other ſecurities, given for money won at play, ſhall be utterly void [a]; and that all conveyances and ſecurities of

9 Anne, c. 14.

[a] "Arreſtment being laid in the hands of a perſon, who was debtor in certain bills to the common debtor, the arreſtee brought a reduction of the bills on the 9th act of queen Anne, and offered to prove by the oath of the creditor in the bills, that the ſum was loſt at play. Objected, That the oath of a cedent is not competent in prejudice of an onerous aſſignee. The lords found it competent to prove the reaſon of reduction by the oath of the winner, even againſt an onerous aſſignee. C. Home, Nov. 7, 1740, Pringle contra Biggar. The contrary was found where the onerous indorſee was not privy to the ground of debt. C. Home, Feb. 18, 1741, Stewart contra Hyſlop. The ſame, Kilkerran, Jan. 24, 1742, Neilſon contra Bruce. (See Bill of Exchange.) A ſhoemaker purſued a brother of the ſame trade for payment of a bill of 8l. ſterling. The defence was, That it was money loſt at play, and the ſecurity was null on the ſtatute 9th of queen Anne. Anſwered, The winner kept a public houſe, and they had played at different times for liquor, which was actually drank by the loſer, ſo that he got value for his bill; and, 2do, The ſtatute is levelled at *exceſſive and deteſtable gaming*, which this is not. The lords found the bill void. March 5, 67, Maccoull contra Braidwood." *D.* Vol. iv, tit. *Pact. illicitum.*

"T. 14 Geo. II, Bowyer v. Bampton. Upon a caſe ſtated at *niſi prius* in an action by the plaintiff as indorſee of ſeveral promiſſory notes, it appeared that the notes were given by the defendant to one Church for money by him knowingly advanced to the defendant to game with at dice, and that Church indorſed them to the plaintiff for a full and valuable conſideration, and that the plaintiff was not privy to, or had any notice, that any part of the money for which the notes were given had been lent for the purpoſe of gaming. Upon this a queſtion aroſe on the above ſtatute of 9 Anne, c. 14, whether the plaintiff could maintain this action, and the court were of opinion he could not; for it is making it of ſome uſe to the lender if he can pay his own debts with it, and will be a means to evade the act. And though it will be ſome inconvenience to an innocent man, yet that will not be a balance to thoſe on the other ſide. And the plaintiff is not without remedy, for he may ſue Church on his indorſement. Str. 1155.

H. 19 Geo. II, Barjeau and Walmſley. The plaintiff and defendant gamed together, at toſſing up for five guineas at a time. And the plaintiff having won all the defendant's ready money, lent him ten guineas at a time, and won it, till the defendant

§ 3. BRITISH STATUTES.—9 ANNE, C. 14.

lands made upon the ſame conſideration, ſhall enure and be to the ſole uſe and benefit of the heir of the granter.

had borrowed 120 guineas. In an action for money lent, it was inſiſted for the defendant, that by the 9 Anne, c. 14, the plaintiff could maintain no action; for by that act, all ſecurities for money lent to game with ſhall be void; and the borrowing on an agreement to pay is a ſecurity. But chief-juſtice Lee held that this was not a caſe within the act, for there is not the word contract, as in the ſtatute of uſury; and the word ſecurities, as it ſtands in this act, muſt mean laſting liens upon the eſtate. The parliament might think there would be no great harm in a parole contract, where the credit was not like to run very high; and therefore confined the act to written ſecurities. Wherefore the plaintiff obtained a verdict for 126l. Str. 1249.

In the caſe of Rawdon and Shadwell, April 23d, 1755—A bill was brought by the plaintiff for an injunction, and that the defendant might deliver up the plaintiff's bond for 115ol. for money loſt at play, and might refund a ſum of 15ol. paid by the plaintiff in part of the ſaid bond. It appeared, that the plaintiff was a lieutenant, and the defendant a captain in Cotterel's regiment; and about 14 years ago, being quartered at Leeds in Yorkſhire, the defendant won of the plaintiff in one evening the ſum of 115ol. The plaintiff was under age; and being ſo, gave a bond for the money to the defendant; and afterwards, when of age, paid 15ol. in part. It was inſiſted for the plaintiff, that the ſecurities by the ſtatute of the 16 Car. II, were totally void, and ought to be delivered up; that the property of an infant in money loſt at play is not altered, and therefore trover would lie; and the ſtatute of the 9 Anne was mentioned, and a caſe in 2 Mod. 91. For the defendant it was urged, that the plaintiff, on the ſame evening, won of another in the ſame company, to-wit, the ſurgeon of the regiment, a larger ſum than the 115ol. which has been paid by him. That fair gaming is not *malum in ſe*. It is only prohibited *ſub modo*. That the caſe cited was of money loſt with falſe dice, which the court takes cognizance of as a cheat. That the ſtatute of Anne gives the court juriſdiction only as to a diſcovery. That as to the 15ol. it was paid after he came of age; and if the court ſhould order the defendant to refund at the diſtance of 14 years, it would occaſion an infinite number of applications. That the ſtatute of 16 Car. II gives no remedy to recover money already paid. That there has been too long an acquieſcence. That money paid, even in caſes of bribery and corruption, cannot be recovered at law. That the ſtatute of Anne has directed an action within three months, for money loſt and paid at play. The lord chancellor ſaid, the decree he ſhould make was not founded on any imputation on the character of the defendant, who had put in a very candid anſwer. But this is a breach of the law, from a falſe principle of honour. And he was of opinion, that the

§ 3. BRITISH STATUTES. —9 ANNE, c. 14.

ſtatute farther enacts, that if any perſon, at any time ſ[a], loſes 10l. ſterling at play[b], he may ſue the winner,

as entitled to the whole
ed; that a party may come
ourt to have a void ſecurity
up; that refunding the
of courſe, as the ſtatute has
ſecurity void to all intents
ſes." Burns, t. Gaming.

) Geo. III. Bones againſt
n a motion for a new trial,
yn reported from the laſt
izes, that the action was
) recover back 14 guineas
aming, upon the ſtatute of
The play was at a coffee-
riſtol. They played at all-
wo guineas a game, from
rening to Tueſday evening,
ry interruption, except for
r two at dinner, but the
nd defendant never parted
It was inſiſted at the trial,
as not won at any *one* ſit-
s to fall within the ſtatute,
he dinner had intervened.
judge thought otherwiſe:
the jury found a verdict
fendant, much to the diſ-
n of the judge. On ſhewing
as inſiſted, that a new trial
on for a penalty was unpre-
and that as both parties
blers, neither was intitled
our or indulgence from the
ſtice Gould (in the abſence
ſtice De Grey) was clearly
ng a new trial, the verdict
nifeſtly contrary to evidence.
te (with reſpect to the party
remedial, not *penal*. He is to recover back his money, and to that end the 3d ſection of the ſtatute allows a bill in equity for a diſcovery; which plainly ſhews that it was not conſidered as a penal ſtatute. Had this been a proceeding on that branch of the ſtatute, which inflicts pillory or other corporal puniſhment, it had been otherwiſe. Judge Blackſtone was of the ſame opinion. The ſtatute makes the winning of 10l. at one *time* or *ſitting*, a nullity; and therefore gives the loſer an action to recover back what ſtill properly continues to be his own money. To loſe 10l. at one *time*, is to loſe it by a ſingle ſtake or bet; to loſe at one *ſitting* is to loſe it in a courſe of play where the company never parts, though the perſon may not be actually gaming the whole time. Judge Nares was of the ſame opinion. The ſtatute is *remedial* where the action is brought by the party injured, but *penal* where brought by a common informer. And the rule was made abſolute for a new trial. Black. Rep. 1226.

b The words are, "cards, dice-"tables, or other game whatſoever, "or by betting on the ſides of ſuch "as do play."

M. 15 Geo. II. Goodburn and Marley. It was determined, that horſe races are within theſe general words. Str. 1159. So alſo in the caſe of Blaxton and Pye, E. 6 G. 3. 2 Wilſon, 309.

And in the caſe of Lynall and Longbotham, M. 30 Geo. II, it was

§ 3. BRITISH STATUTES. —9 ANNE, c. 14.

and recover it back by action of debt at law; and, in ca the loſer does not recover back the money loſt within thr months, any other perſon may recover the ſame, and treb the amount beſides, with coſts, one half to himſelf, the oth half for the poor [c]. And every perſon who ſhall be liable be ſued for the ſame, ſhall be obliged and compellable anſwer, on oath, ſuch bill as ſhall be preferred againſt hi for diſcovering the ſum of money, or other thing ſo won So far this ſtatute goes towards diſcouraging even gami when conducted in a manner perfectly fair.

May recover the winnings back.

Unfair play, or winning more than 10l. ſterling at a ſitting.

BUT it farther enacts, that if any perſon, by cheating play, ſhall win any money or valuable thing, or ſhall, at a one time or ſitting, win more than 10l. ſterling, he ſhall f feit five times the value, recoverable by the perſon who w ſue for the ſame [c]: and, (in caſe of cheating), ſhall be dec

admitted on all hands that a foot race alſo is within the ſtatute, and that a footman running againſt time is a foot race; but in this caſe, for a flaw in the declaration in not laying the fact cloſe enough to the words of the ſtatute, the defendant had judgment. 2 Wilſ. 36.

In the caſe of Clayton and Jennings, E. 10, Geo. III. On an action for 5 guineas, won by betting at a horſe race, it appeared that the bet was 10 guineas by the plaintiff, to 5 by the defendant. The plaintiff won, and obtained a verdict. It was moved in arreſt of judgment, that there was no mutuality in the wager; for as by reaſon of the ſtatute the defendant could not have recovered the 10 guineas, therefore the plaintiff ſhall not now recover the 5. And of that opinion was the court. And judge Aſton mentioned the caſe of Connor Quick in the king's bench about years before, when the court took diſtinction between running a h for 50l. which was lawful; and b ting on the ſide of the horſe, wh was not ſo. And in the preſent c by the opinion of the whole co judgment was arreſted. Black. R 706.

[c] Chriſtian's Blackſtone, B. iv. 172.

But this ſtatute does not repeal Scottiſh ſtatutes; under which, th fore, without waiting three mon the magiſtrates therein mentio may ſue for the overplus beyond 100 merks Scots.

[d] 9 Anne, c. 14, § 3; 18 Geo c. 34, § 3.

[e] § 5.

The 18 Geo. II, c. 34, § 8, m

famous, and ſuffer ſuch corporal puniſhment as in caſe lful perjury [f].

§ 3. BRITISH STATUTES. —LOTTERIES.

ſeveral ſtatutes, in the reign of king George II, all e lotteries, by tickets, cards, or dice, (and particularly mes of pharo, baſſet, ace of hearts, hazard, paſſage, oly, and all other games with dice, except backgam- are prohibited under a penalty of 200l. for him that rect ſuch lotteries, and 50l. a time for the players [g]. the penalties of 200l. and 500l. are recoverable on tion "before any one juſtice of the peace for any y . . . or before the mayor, or other juſtice of the , for any city or town corporate, upon the oath of one ſs . . . or upon the view of ſuch juſtice, or on the con- n of the party accuſed; which forfeiture, after deduct- e reaſonable charges, ſhall go, one third to the informer, he remaining two thirds to the uſe of the pariſh where offence ſhall be committed." An appeal lies to the general quarter ſeſſions [h]. But the appellant muſt ter into a recognizance before ſome juſtices of the y... wherein the conviction or judgment was made... two ſufficient ſureties . . . to try ſuch appeal at the quarter ſeſſions." The matter is then to be finally mined. The appellant, if unſucceſsful, pays treble

Judges.

Proof.

Application of the penalty.

Appeal.

The action muſt be commenced within three calendar hs. The purſuer, if he fails in his action, pays treble ices [i].

ſon liable to be indicted before rt of king's bench. That clauſe, rſe, does not extend to this .

Anne, c. 14, § 5.

Geo. II, c. 28. The purpoſe ſtatute was to declare, that the of ace of hearts, &c. were within the deſcriptions of the lotteries prohibited by 10, 11 Will. III; 9 Anne, c. 6; 8 Geo. II.

[h] § 5.

[i] By *finally determine*, it is meant only that the cauſe ſhall be decided by the juſtices before it be brought before the ſupreme court.

§ 3. BRITISH STATUTES. —LOTTERIES.

THESE enactments of 12 Geo. II, c. 28, are laid down generally, and do not appear to be limited to England[k].

[k] There ſeems reaſon to doubt whether the following clauſes are applicable to Scotland. By clauſe 6, the matter is not to be brought by *certiorari* into the king's bench, till the determination be given thereupon by the quarter-ſeſſions. Whenever the queſtion is brought to a final judgment by the ſeſſions, it may be competent, notwithſtanding this clauſe, to bring the cauſe immediately under the review of the court of ſeſſion by advocation, without applying at all to the quarter ſeſſions. For the legiſlature has not ſaid the reverſe expreſsly; and the court of ſeſſion would not probably think itſelf at liberty to eke out the imagined meaning of the legiſlature, and extend the ſtatute by analogical conſtructions.

In like manner, ſection 7th enacts, "that no *certiorari*, or other proceſs, ſhall iſſue to remove the record of any ſuch conviction from the ſaid court of quarter ſeſſions, touching ſuch conviction, into any of his majeſty's courts of record at Weſtminſter, until the party find two ſureties in 100l. ſterling for his proſecuting the *certiorari*. For the ſame reaſon, as juſt now ſtated, this ſecurity could not be exacted in Scotland from the party coming before the court of ſeſſion by advocation. The ſupreme court at common law has a right of review, wherever it is not expreſsly excluded; and it muſt have it without ſuch qualification as to the ſecurity, becauſe the ſtatute does not expreſsly ſo qualify it."

The other clauſes ſeem to be general, and to extend to this coun Thus, clauſe 8th, permits the juſti to inflict ſix months impriſonme on perſons unable to pay the pen ties; and, by clauſe 9th, if any j tice neglect or refuſe to do wha required of him, he is liable in ſterling for each offence, recover by any perſon who ſhall ſue for ſame, by "plaint or information, any of his majeſty's courts of reco or at the aſſize for any county; which action, bill, plaint, or infor ation, no eſſoign, protection, or wa at law, nor more than one imparl ſhall be allowed." This techn phraſeology does not very well ap to our practice; but ſtill, under word "his majeſty's courts of recor the court of ſeſſion may be reaſ ably thought to be included. T penalty goes one half to the inform and one half to the poor of the pa where the offence was commit The action againſt ſuch juſtice magiſtrate muſt be commenced wi in ſix months after his refuſal to p ſecute.

This act does not hinder gener palaces where the king reſides; a joint proprietors, or tenants ſeve their reſpective proportions of t property by lot. Actions muſt brought within three calendar mont If the plaintiff or proſecutor non-ſuited, or if he diſcontinues action, or if judgment goes aga him, the defendant recovers tri coſts.

13 Geo. II, c. 19, § 9, extends prohibition of the former ſtatut

§ 3. BRITISH STATUTES. —LOTTERIES.

lic lotteries, that is, thoſe that are regulated by the
s of the ſtate lottery, unleſs by authority of act of
ent, and all manner of ingenious devices, under the
nation of ſales or otherwiſe, which in the end are
nt to lotteries, are prohibited by a great variety of
, under heavy pecuniary penalties [1].

Public lotteries.

of paſſage, and all games in-
to be invented with one or
; but backgammon . . . un-
e penalties, and recoverable
e manner with thoſe under
r act. The obſervations,
made with reſpect to the
ill apply to this act alſo.
. II, c. 34, extended the
n and penalties of the above
Geo. II, c. 28, to roly-poly.
th empowers all perſons
riſdiction in caſes of gam-
any information exhibited
m, for any offence againſt
r that of 12 Geo. II, c. 28,
. II, c. 19, to ſummon any
give evidence, upon penalty
rling, to be levied by diſ-
ale; and in default of ſuch
e perſon thus refuſing or
to appear, or giving falſe
may be impriſoned for ſix
nd, by § 5, no perſon other
plaintiff and defendant in
ſhall be incapable of being
ouching any offence againſt
e preventing gaming.
ſection, touching courts of
s not apply to our prac-
§ 8th, veſting a criminal
in the court of king's
ot extend to this country.
ber of ſtatutes upon this
d not ſurpriſe us. It is a neceſſary conſequence of the plan that ſeems to be adopted of making a new enactment upon the appearance of every new game. For "the inventions of ſharpers being ſwifter than the puniſhment of the law, which only hunts them from one device to another . . . particular deſcriptions will ever be lame and deficient, unleſs all games of mere chance are at once prohibited." Blackſtone, B. iv, p. 173. Indeed, to us in Scotland, the words of ſome of thoſe ſtatutes appear ſufficiently broad to have that effect.

[1] 10 Anne, c. 26, § 109, it is enacted, that every perſon who ſhall keep any office or place for making inſurances on marriages, births, chriſtenings, or ſervice, or any other office or place, under the denominations of ſales of gloves, fans, cards, numbers, or the queen's picture, for the improvement of ſmall ſums of money, ſhall forfeit 500l.; one third to the king, one third to the poor, and one third, with full coſts, to the party informer, to the perſon who ſhall ſue for the ſame; and every printer, or other perſon, who ſhall publiſh the keeping any ſuch office, ſhall forfeit 100l. to be diſtributed as the penalty laſt mentioned: and every perſon who, in any office before the 24th June 1712, ſet up for making inſur-

§ 3. BRITISH STATUTES. —LOTTERIES.

THOUGH the moſt material clauſes of the ſtatute of 2' Geo. III, c. 1, do not extend to this country, yet, unde

ances on marriages, &c. or under any other the denominations aforeſaid, or any like denominations for improvement of ſmall ſums, ſhall make, or ſuffer to be made, any new inſurances on marriages, births, chriſtenings, or ſervice, or receive any payments for improvement of ſmall ſums, ſhall forfeit 100l. to be diſtributed in like manner.

Theſe penalties are, by clauſe 109, ſaid to be recoverable in any of his majeſty's courts aforeſaid, which, from clauſe 29, appears to mean for England the courts of Weſtminſter, and for Scotland the court of ſeſſion, juſticiary, or exchequer.

Lord Swinton puts a query, whether this act, ſo far as reſpects lotteries, extends to this country? But as Scottiſh courts are thus expreſsly referred to, it does not appear what foundation there is for that doubt.

8 Geo. I, c. 2, § 36, prohibits the keeping of any office, under the denomination of ſales of houſes, lands, advowſons, preſentations to livings, plate, jewels, ſhips, goods, or other things, for the improvement of ſmall ſums of money, or ſhall ſell or expoſe to ſale any houſes, &c. by way of lottery, or by lots, tickets, numbers, or figures, or ſhall make, print, advertiſe, or publiſh, propoſals, or ſchemes for advancing ſmall ſums of money by ſeveral perſons, amounting in the whole to large ſums, to be divided amongſt them by the chances of the prizes in any public lottery, or ſhall deliver out tickets to perſons advancing ſuch ſums, to entitle them to a ſhare of the money, according to ſu propoſals or ſchemes, or ſhall mak print, or publiſh, any propoſal ſcheme of the like kind; and ſhall thereof convicted, on the oath of o witneſs, by two juſtices of the pe where ſuch offence ſhall be comm ted, or the offender found, the p ſon ſo convicted ſhall (over and abo any former penalties) forfeit 500 one third to the crown, one otl third to the informer, and the maining third to the poor of the p iſh where the offence ſhall be co mitted, to be levied by diſtreſs a ſale of goods, by warrant of the j tices, and ſhall alſo be committed the county gaol for one year, and the 500l. be paid. Perſons aggrie may appeal to the next quarter ſ ſions, where the judgment ſhall final.

8 Geo. II, c. 2, § 29, for prevent the evaſion of the ſtatute 9 Geo againſt ſelling tickets in any fore lottery, under the penalty of 2 and one year's impriſonment, fur enacts, that if any perſon ſhall ſell deliver any ticket in any foreign tery, and ſhall be convicted upon tion, or information in any of courts of record at Weſtminſter upon oath or affirmation of one neſs, before two juſtices of pe where ſuch offence ſhall be comm ted, or the offender found, the pe convicted ſhall forfeit 200l.; third part to his majeſty, one t part to him who ſhall make infor ation of the offence, and the rem ing third to the poor of the pa

ier clauſes of it, Scottiſh juſtices have juriſdiction as well the Engliſh. For the ſtatute enacts, that perſons dealing ottery tickets, without being licenced, or inſuring againſt

: levied by diſtreſs and ſale of s, and ſhall alſo be committed to aunty gaol for one year, and till um of 200l. be paid. And, by any perſon aggrieved by the ment of ſuch juſtices ſhall have y to appeal to the next quarter s, whoſe judgment ſhall be

Geo. III, c. 47, alſo regards ſell- ckets in the ſtate lottery; but a quent ſtatute, 27 Geo. III, c. 1, ng the ſtatute 8 Geo. I, c. 2, o. II, c. 28, and 22 Geo. III, , enacts, "that from and after ay on which this act ſhall receive jeſty's royal aſſent, no pecuniary ty or penalties which ſhall be in- d by any perſon or perſons of- ng againſt ſuch parts of the ſaid or any of them as touch and en lotteries, ſhall be recovered overable before any juſtice or ces of the peace, but ſhall and be ſued for by any perſon or on whomſoever, at any time in ſix calendar months next after offence ſhall be committed, and ered by action of debt, bill, t, ſuit, or information, in any of jeſty's courts of records at minſter." With reſpect to Scot- therefore, thoſe ſtatutes are ſo pealed, ſince it was omitted to riſdiction to ſome other Scot- rt inſtead of the juſtices.

ſtatute, § 8, generally ſays, no perſon or perſons ſhall be or liable to any proſecution before any juſtice or juſtices of the peace for any offence againſt the herein before-mentioned acts touching and concerning any lottery. However, in the caſe of K. v. Leſton T. 33 Geo. III, it was determined by the court of king's bench, that the above ſtatute only extends to ſtate lotteries, and does not repeal the ſummary juriſdiction of magiſtrates over games of chance or lotteries prohibited by 12 Geo. II, c. 28. (Durnf. and Eaſt, 5 V. 338.) So the ſtatute 12 Geo. II, and the others, remain in force ſtill with reſpect to private lotteries.

This ſtatute, 27 Geo. III, c. 1, when it takes the juriſdiction from the juſtices of peace, gives it, as we have ſeen, excluſively to the court of king's bench. Not adverting to that, in a caſe above mentioned, the procurator-fiſcal for the town of Edinburgh laid a complaint on that ſtatute, againſt a private lottery which had been advertiſed. The court were very clear that the limitation of the remedy to the court of king's bench prevented the execution of the ſtatute in this country, while they were equally clear that the ſtatute muſt have been intended to have force over both parts of the united kingdom; and as one of the judges expreſſed it, that it was owing to "a blunder" that the clauſe in queſtion had been expreſſed in that limited manner. Fraſer againſt Scot, 7th July 1796, Dict. Vol. iv. *Pactum illicitum.*

§ 3. BRITISH STATUTES. —LOTTERIES.

the drawing of any ſuch ticket, or receiving money, &c. in conſideration of any agreement to repay money or goods, upon any contingency relative to the drawing any ſuch ticket, ſhall be deemed rogues and vagabonds within the meaning of 17 Geo. II, c. 5.

BUT no perſon ſhall be liable to be proſecuted by action, for the recovery of a pecuniary penalty, and by impriſonment as a rogue and vagabond [m].

One juſtice.

BY 34 Geo. III, c. 40. On complaint upon oath before one juſtice, of any offence committed againſt the act of 27 Geo. III, c. 1, for ſuppreſſing unlawful lotteries in any houſe or place within the juriſdiction of ſuch juſtice, whereby any offenders may be liable to be puniſhed as rogues and vagabonds, ſuch juſtice, by warrant, may empower any perſon employed by the commiſſioners of the ſtamp duties in the execution of the acts for the regulating of lotteries, by

Breaking up doors.

day or by night, (but if in the night in the preſence of a conſtable, who is required to be aiding and aſſiſting therein) to break open the doors of any part of ſuch houſe or place where ſuch offence ſhall have been committed, and to enter and ſeize all ſuch offenders or other perſons, who ſhall have

In the night.

knowingly aſſiſted or been any ways concerned in committing ſuch offence, and convey them before any juſtice of the county, city, or place, wherein ſuch perſon ſhall be ſo apprehended, to be dealt with according to law; and all perſons who ſhall have been diſcovered in ſuch houſe or place

One juſtice.

knowingly aiding, aſſiſting, or any ways concerned with ſuch offenders in carrying on any ſuch tranſactions, ſhall be deemed rogues and vagabonds, and puniſhed accordingly; and the officer having the execution of ſuch warrant, or perſon acting in his aid or aſſiſtance, may arreſt any ſuch

[m] § 7.

3

ersons so discovered in such house or place, and convey them before a justice as aforesaid. And if any person shall forcibly obstruct or hinder any such officer, or others acting in his aid or assistance, in the execution of their duty herein, he shall be deemed an offender against law, and the court before whom he shall be tried and convicted may order him to be fined, imprisoned, and publicly whipped, as in their discretion shall be thought fit. And all persons, although not discovered in such house or place as aforesaid, who shall employ any person in carrying on any of the transactions aforesaid, or be aiding or assisting therein, shall be deemed rogues and vagabonds, and punished accordingly[a]. § 3. BRITISH STATUTES. —LOTTERIES.

AND if any person shall be brought before any two justices, and shall be convicted of any offence against the said act of 27 Geo. III, c. 1, or of this act, whereby he shall be adjudged a rogue and vagabond, such justices may order him to be sent to the house of correction, for any time not exceeding six, nor less than one calendar month, and until the final period of the drawing of the lottery in respect whereof such offence shall be committed; and such proceedings shall not be subject to appeal, nor removeable by *certiorari*[b]. Offenders adjudged rogues and vagabonds may be committed.

A STILL later statute, 42 Geo. III, c. 119, gives important powers to Scottish justices, although, like many other of the British statutes, it is so worded, as not, in many cases, to admit of execution in this country.

THIS statute declares all games, or lotteries, or wheels called little-goes, public nuisances. And persons keeping any office or place for any game or lottery not authorized by law, shall forfeit 500l. and be deemed rogues and vaga- —LITTLE-GOES.

[a] § 37. [b] § 40.

§ 3. BRITISH STATUTES. —LOTTERIES.

bonds within the meaning of 17 Geo. III, c. 5[n]. Offe not proceeded againſt for the penalty, may be proc againſt as rogues under 17 Geo. II, c. 5; and 27 Ge c. 1.

THE ſtatute[o] prohibits any perſon to pay money, c liver goods, &c. on any event relative to ſuch game c tery, or publiſh any propoſal, under penalty of 100l. fenders may be apprehended on the ſpot by any one carried before a juſtice, who ſhall, on the penalty not paid, commit them for 6 months, and till payment, wi appeal; one third to his majeſty, one third to the info and one third to the apprehender. The proviſions Geo. III, c. 1, extended to this act.

One juſtice. Impriſonment. Penalty, application of.

WITH regard to public lotteries, then, in this cot there ſeems to be no other regulation, excepting what from the revenue ſtatutes requiring a licence.

—GAMING HOUSES.

EVEN in England, all common gaming houſes are ſances in the eye of law, and it is *contra bonos mores* t by gaming as a profeſſion. So by queen Anne's act[p], two juſtices may cauſe to come, or to be brought b them, every perſon whom they ſhall have juſt cauſe te pect to have no viſible eſtate, profeſſion, or calling to r tain himſelf by, but do for the moſt part ſupport t ſelves by gaming; and if ſuch perſon ſhall not make i pear to the ſaid juſtices that the principal part of hi pences is not maintained by gaming, they ſhall requi him ſufficient ſureties for his good behaviour for 12 mo

Two juſtices.

Perſons having no means of living.

[n] The 500l. is to be recovered in the court of exchequer, at the ſuit of his majeſty's attorney general. In Scotland, we have no doubt a court of exchequer, but we have no attorney general; of courſe this pen not recoverable in Scotland at

[o] § 5.

[p] c. 14, § 6.

nd in default of his finding ſuch ſecurities, ſhall commit im to the common gaol until he ſhall find ſuch ſecurities s aforeſaid."

§ 3. BRITISH STATUTES.

"AND if he ſhall, during the time for which he ſhall be ound, at any one time or ſitting, play or bet for any ſums, r other thing exceeding in the whole the value of 20s. ich playing ſhall be deemed a forfeiture of the recogniz- nce [q]."

FOR preventing ſuch quarrels as may happen on the ccount of gaming, queen Anne's ſtatute farther enacts, hat if any perſon ſhall aſſault and beat, or challenge to ight, any other perſon whatſoever, on account of any money ron by gaming, playing, or betting, at any of the games foreſaid, he ſhall, on conviction thereof by indictment or nformation, forfeit to the king all his goods and chattels nd perſonal eſtate whatſoever, and ſhall alſo ſuffer impri- onment without bail or mainprize, in the common gaol of he county where the conviction ſhall be had, during the erm of two years [r].

Quarrels.

Beating, &c. on account of gaming.

Puniſh- ment.

THE ſtatute 13 Geo. II, c. 19, to prevent the multiplicity horſe races, another ſource of gaming, directs, that no plates matches under 50l. value ſhall be run, upon penalty of 00l. to be paid by the owner of each horſe running, and 0l. by ſuch as advertiſe the plate. Newmarket and Black mbleton are excepted, where a race may be run for any 0 or ſtake though leſs than 50l. [s]

—HORSE RACES.

Matches under 50l.

Exceptions.

§ 7.

[q] 9 Anne, c. 14. § 8.

[r] the caſe of Bidmead and Gale, Geo. III, an action of covenant rought upon articles to run a horſe match. The agreement was, that each ſhould ſtart his mare; and that if either ſhould refuſe or neglect, he ſhould forfeit and pay 25l. to the other. So that it was a match for

§ 3. BRITISH STATUTES.

BUT though ſuch horſe races are lawful, yet it has been determined that they are games within the ſtatute of 9 Anne, c. 14, and that, of conſequence, wagers above 10l. upon a lawful horſe race are illegal[t]. A foot race, and a race againſt time, have alſo been held to be games within the ſtatute of gaming[u]. So a wager, to travel a certain diſtance within a certain time, with a poſtchaiſe and a pair of horſes, has been conſidered of the ſame nature[x]. A wager for leſs than 10l. upon an illegal horſe race is alſo void and illegal[y]. But this ſtatute cannot be executed in Scotland, as the penalty is only recoverable in the Engliſh courts of king's bench and

Wagers on horſe races, foot race, againſt time.

25l. each ſide, play or pay: but the plaintiff was to pay the defendant 5l. before-hand, as a conſideration to induce him to make the match. The defendant afterwards refuſed to run the match. Whereupon the plaintiff brought this action againſt him, for the 25l. and aſſigned the breach of covenant, in the defendant's not ſtarting his mare. The cauſe was tried before Mr. Baron Perrot, who conſidered it as a match for 50l. and directed a verdict for the plaintiff, with liberty to move in arreſt of judgment. A motion in arreſt of judgment was accordingly made. And after ſome ſmall altercation whether this were within the ſtatutes of gaming, the matter was reduced to this ſingle queſtion, whether this was a match for 50l. or for leſs than 50l.? If it was for leſs than 50l. it is prohibited by the ſtatute of 13 Geo. II, c. 19, which enacts, that no match, unleſs at Newmarket or Black Hambleton, ſhall be run for any ſum of money or other thing of leſs value than 50l. For the defendant it was urged, that this was only a match for 25l. as neither party could loſe more than that ſum; or, at the utmoſt, a match for 45l. as the total of both ſums riſked did amount to no more; for there was no riſk remaining upon the 5l. which the defendant had received from the plaintiff, and had ſafe in his pocket without poſſibility of loſing it upon this match. The plaintiff's counſel argued, that the ſum run for was moſt manifeſtly 50l. and that the advancing 5l. certain made no ſort of difference. The court, as it turned upon the conſtruction of a general act of parliament, took a few days to conſider. After which, lord Mansfield declared that they were all of opinion, that this was a match for 50l. though the ſtakes were unequal, of which the plaintiff contributed 30l. and the defendant 20l. that is, they ſtaked after the proportion of three to two. Burr. Manſf. 2432.

[t] 2 Bl. Rep. 706; Chriſtian's Black. B. iv, p. 173.

[u] 2 Wilſ. 36.

[x] 6 T. N. 499.

[y] 4 T. R. 2; Chriſtian's Black. ib.

In Scotland, therefore, there is no diſtinction be- § 3. BRITISH STATUTES.
kes above and below 500l. as to the legality of horſe In Scotland, law as to races.

UGUSTUS CÆSAR ſometimes employed lotteries as a § 4. STATE LOTTERY.
t entertainments [a]. In England, the firſt lottery,
ount, drawn under the ſanction of public authori-
n the reign of James I [b]. It has long been con-
one of the ordinary ſources of revenue. And a
e of revenue it is admitted it would be, could the
ſſes be ſhielded from its miſchiefs. For which
Mr. Colquhoun ſuggeſts various plans [c]. It is clear,
hat the more expeditiouſly the lottery is drawn, and
the number of tickets drawn each day varies, the
ctually will thoſe evils be prevented, which ariſe
daily inſurance on blanks and blank and prize.

country can reaſonably expect to increaſe in wealth,
more or leſs, experiencing thoſe diſorders which
nally engenders; ſo in Scotland we cannot pretend
hat *ætas parentum, pejor avis, tulit nos protulit nequiores.*
ay congratulate ourſelves that we are ſtill ſtrangers
enormous effects of this vice, which are ſaid to
much public alarm and uneaſineſs, as well as
iſery, in the capital of the empire; where of
s appeared in the formidable ſhape of *partner-*
ns; a floating capital little ſhort of one million
eing employed in "the carrying on various ille-
iſhments; particularly gaming houſes, ſhops for
t inſurances in the lottery; together with ſuch ob-
liſſipation, as the races at Newmarket, and other

m's Rom. Antiq. p. 458.
nclair's Hiſt. Pub. Rev.
"The profit was prin-
ated to defray the ex-
pences of our eſtabliſhment in America"
[c] Colquhoun's Treatiſe on the Police of the Metropolis, ch. 6.

§ 4. STATE LOTTERY.

places of faſhionable reſort[c]:" "ſyſtems of ruin and pravity," the miſchiefs whereof "have become great a alarming beyond calculation[d]." Mr. Colquhoun even m tions, that "another part of this capital was ſaid to fo the ſtock which compoſes the various faro-banks, whi were to be found at the routes of ladies of faſhion[e]."

IT is amuſing to compare Mr. Colquhoun's chapter c gaming with the deſcription given by Tacitus of the effec of this bewitching paſſion among the ancient Germans. "i is wonderful," ſays the hiſtorian, "that, when ſober, th addict themſelves to dice as a ſerious employment, with ſuc a mad deſire of winning or loſing, that, when ſtript of eve thing elſe, they will ſtake at laſt their liberty, and even the very ſelves[f];" Mr. Colquhoun, again, ſpeaks of it as n uncommon for perſons, after loſing their money, to paw watches and rings; and a deluded young man has be ſeen at laſt to "throw off his coat, and go away, loſing alſo[g]." So a deſperate rage for the excitement which exce ive gaming produces, and to which every valuable conſide ation is ſacrificed, would ſeem to be equally the diſeaſe very ſavage manners, and of times of extreme refinement.

[c] Colquhoun, ibid.

[d] Ibid. Mr. Colquhoun mentions an affidavit, made in one of the ſuperior courts of juſtice, which ſtates, that "the principle gaming houſes at the weſt end of the town have ſtated days on which they have luxurious dinners, (Sunday being the chief day), to which they contrive to get invited merchants and bankers clerks, and other perſons intruſted with money; and that it has been calculated, (and the calculation was believed not to be over-rated), that the expences attendant on ſuch houſes, amounted to 150,000l. yearly, and that keepers of ſuch houſes, by means their enormous wealth, bid defia to all proſecutions, ſome of them h ing acquired from 50 to 100,0 each: conſiderable eſtates have b frequently won by them in the co of one ſitting."

[e] Ibid.

[f] De Mor. Germ. cap. 24.

[g] Evidence of John Shepherd, trial in the court of king's bench gaming, 29th Nov. 1796. See quhoun, p. 147.

BOOK IV.

RURAL POLITY.

CHAP. I.

Of Property.

§ 1. IN GENERAL. Original community. Things ſubject to appropriation. Origin of property.

LORD STAIR obſerves, that, "at firſt, dominion of the creatures being given to man, without diſtinct proportions or bounds, it neceſſarily followeth, that, by the law of nature, the birth and fruit of both ſea and land were *common* to all mankind . . . yet ſo as the uſe and fruit thereof *muſt*, in ſome caſes, and *might*, in all caſes, become *proper*; as what any had taken and poſſeſſed for his uſe . . . and much more, what had received ſpecification from his art and induſtry . . . could not, without injury, be taken from him [a];"

[a] Lord Stair, B. ii, t. 1, p. 166. In illuſtration of the ſame idea of the origin of property from occupancy, Grotius quotes the expreſſion of Seneca, "*Equeſtria* omnium equitum Romanorum ſunt. in illis tamen locus meus ſit proprius, quem occupavi." (De beneficiis vii, c. 12.)

§ 1. IN GENERAL.

or, in the words of Mr. Locke, "though the things of ture are given in *common*, yet man, by being maſter of ſelf, and proprietor of his own perſon, and the actions o labour of it, had ſtill in himſelf the great foundation of

The produce of labour.

perty[a]. The fruit or veniſon which nouriſhes the wild In who knows no incloſure, and is ſtill a tenant in common, be *his;* and ſo *his*, that another can have no longer any to it before it can do any good for the ſupport of his l God gave the world to man in common, but, ſince he ga for their benefit, he gave it to the uſe of the induſtrious rational... The law man was under was rather for ap priating. God commanded, and his wants forced hi labour. That was his property, which could not be t from him, wherever he had fixed it[c]."

THAT permanent and abſtract relation, indeed, w conſtitutes our idea of property, would not, for ſome t be well underſtood. On the contrary, "in theſe firſt there was no property diſtinct from *lawful poſſeſſion*, not of moveables, but alſo of parts of the earth; for when ſeſſors removed from theſe parts, they ceaſed to be th and became the next poſſeſſors; and therefore *the ſcri calleth them poſſeſſions, without mention of any other proper*

THUS, then, the excluſive appropriation of ſuch thin are exhauſtible—as are adapted for man's purpoſes—an improveable or produced by his induſtry, becomes juſt neceſſary.

II. SIR Thomas Craig[e], as well as Heineccius[f], &

[a] Locke's Works, Vol. ii, p. 179.
[b] Ibid, p. 174.
[c] Ibid, p. 176.
[d] Stair Inſt. B. ii, t. 1, § 1, p. 166. This idea is enforced and illuſtrated by lord Kames, in his hiſtorical on property. (Law tracts, tr.
[e] *De Feudis*, Lib. i, dig. 15. §
[f] Inſt. Lib. ii, tit. 1.

Gaius' general arrangement of things, as either *divini juris*, that is, ſacred; or *humani juris*, that is, ſecular[d]. § 2. DIVISION OF THINGS.

PROPERLY ſpeaking, "we have no conſecration of things, ſince the Reformation; yet ſome things have a relative ſanctity, and ſo fall not under commerce[e];" ſuch as churches, bells of churches, communion cups, and other things deſtined to ſacred purpoſes, and which cannot be applied to private or ſecular uſes[f]. Sir George Mackenzie, after the civilians, ſtiles church-yards religious. Any ſpot of ground where a human corpſe was buried, was, by the civil law, for ever exempted from commerce. But, with us, a man may bury his dead within his property, and ſuch burying ground continues *juris privati*, and ſo paſſes in a ſale to the purchaſer, as part of the lands within which it lies. "As for our common burying places, decency requires that theſe, when they are no longer to continue ſuch, ſhould be ſequeſtered from the ordinary uſes of property, till the remains of the bodies there interred ſhall have returned to their original duſt[g]." —SACRED. Burying ground.

SOME are, from their nature, incapable of appropriation, Humani juris.

[d] L. i, ff. *de diviſione rerum*; whereas Juſtinian, Pr. Inſt. *de rerum diviſione*, conſiders *res ſacras* as a ſubdiviſion of *res nullius*.

[e] Sir George M'Kenzie, Inſt. B. ii, t. 1, § 4.

[f] "Yet our law allows, in certain caſes, churches to be removed from one place to another; and the bells of churches, and communion cups, when they become unfit for ſervice, to be melted down, or ſold by the kirk ſeſſion, with conſent of the heritors of the pariſh, and the price applied towards purchaſing others. Though churches fall not under commerce, becauſe a church is the houſe of God himſelf, the heritors and other inhabitants of a pariſh may nevertheleſs acquire a *quaſi* property in the ſeats of a church, or in part of its area, limited to the ſpecial purpoſe of attending divine ſervice." (Erſk. B. ii, t. 1, § 8.)

[g] Erſk. B. ii, t. 2, § 8. Accordingly, it has been found, that the miniſter of the pariſh is not entitled to paſture his cattle in the church-yard. Dec. 2, 1798, Hay againſt Williamſon. Fac. Coll

§ 2. DIVISION OF THINGS.

as the air, "becauſe all men everywhere muſt neceſſari "breathe it [h];" running waters, "becauſe they have n "bounds [i];" and "the vaſt ocean, as to navigation an "fiſhings, which are the only uſes thereof [k]."

—NEGATIVE COMMUNITY.

Pearls.

Pebbles.

Wild animals.

THINGS, whether animate or inanimate, which may b come the excluſive property of any perſon by occupancy, a ſaid to be in *negative communion*. Such are "pearls inclo ed in ſhells, or pebbles caſt on the ſhore, which belong to th perſon who finds them; ſuch are (under ſome exceptions be mentioned by and by) wild beaſts, fowls, or fiſhes, whic become the property of the perſon who firſt ſeizes them [l]."

BUT even thoſe uſes of things which are deſtined for pe petual community, may be rendered more eaſy or ſecure b labour or expence; for which, therefore, thoſe who wi thence to derive any benefit, may juſtly be required to ma compenſation.

IN the torrid regions, where one diſcovered and ſecured well, it was underſtood to be his property, even at a peri of ſociety when land continued ſtill in its original commu nity [m]. If a ſtate be at the expence to build fortified h bours, or to clear certain ſeas from pirates, it may jul inſiſt on a proportionable remuneration from all traders w ſhare the benefit. Sometimes, too, things which are co mon, as the ſea-ſhore, harbours, navigable rivers, cannot uſed, without at the ſame time uſing the contiguous la which is property. Hence, therefore, and indeed for th

[h] Stair, Inſt. B. ii, t. 1, § 5.

[i] Ibid. So Ovid:

Quid prohibetis aquis, uſus communis aquarum,
Nec ſolem proprium natura, nec aëra fecit,
Nec tenues undas. Ad publica munera veni. (Met. l. 6.)

[k] Ibid. [l] Erſk. B. ii, t. 1, § 10. [m] Gen. ch. v.

:nce, the governments of the reſpective countries have a controul touching the uſe that is made of gs; which, therefore, are termed public [n].

§ 3. DIVISION OF THINGS —PUBLIC.

s *public* things are reckoned the ſeas, which waſh of any ſtate. Hence the king's ſovereignty in the is [o]. So a ſhore, which, in the civil law, is ex- o be ſo far as the greateſt winter tides do run, muſt be underſtood of ordinary tides, and not of ary ſpring tides [p]"), to that extent is public, ſo ay be uſed, either for navigation, or the protec- ade, or the defence of the ſtate; and, by our con- ice, proprietors who border on the ſea incloſe, as

orge Mackenzie defines to be thoſe which "are y to a nation or people." l, is the moſt uſual defi- g the civilians. Yet the rion ſeems to lie, not in *uſe*, but in the *property the ſtate*; which, on the ay controul, and limit, the native inhabitants in eof, and, as we ſhall ſee, rious inſtances; and, on either can juſtly nor rea- ude foreigners from the hereof, unleſs particular s render it neceſſary to cordingly, Mr. Erſkine, defect, adds, "and to ers to whom it allows the ade." (B. ii, t. 1, § 4.) e giſt of the deſcription property and power of ontroul in the govern- ot in any diſtinction be- es and foreigners as to njoyment of the uſe, ap- the very examples which Mackenzie gives of his own definition, "rivers, harbours, and the right of fiſhing." Now, on the one hand, it is notorious, that all the native inhabitants do not enjoy this right of fiſhing; and, on the other hand, a foreigner, from whom no reaſonable ground of danger is apprehended, is entitled to the uſe of the harbour, to ſail up the river, and to travel on the high roads. To prevent him would be an act of arbitrary power, not more reconcilable to juſtice than in the caſe of a native. Accordingly, while Mr. Erſkine mentions highways among other examples of *public things*, lord Stair ſays expreſsly, "ways and paſſages in land are common to *all*, and may not juſtly be refuſed by one nation to another." (Inſt. B. ii, t. 1, 5.)

[o] Indeed, the famous controverſy, *mare liberum an mare clauſum*, reſolves into a queſtion of *majus aut minus*. Even the Dutch juriſconſults do not deny the legitimate appropriation of creeks, and ſmall corners of the ſea.

[p] Stair, B. ii, t. 1, § 5.

§ 3. DIVISION OF THINGS —PUBLIC.

their own property, grounds far within the ſea mark [q]. S alſo public rivers, by which writers generally underſtan navigable rivers, or thoſe on which floats may be carried t navigable rivers [r]; or, perhaps, any river which is benefici to the public, by affording a conveyance by rafts for com modities to the ſea [s], wherein, therefore, no building or in

[q] Erſk. B. ii, t. 6, § 17. And preſ. Balfour, concerning the flood mark, obſerves, "It is leaſum to ony mariner, maſter of ſhip, or uther perſoun, to louſe or laiden his ſhip, or boat, and lay or place the ſamin, or feſtin his anchor within ye flood mark, in all partis of this realm, but impediment or obſtacle to be made to him yairanent be ony perſoun; bot he may do nane of ye premiſſes outwith ye flood mark in ony man's landis, poſſeſſions, or heretage, except he do ye ſamin with licence and good will. 4th July 1498, Al. Meldrum of Segie, contra Burgh of Cowper, i t. c. 98. (Sea Lawis, c. 56, Practics, p. 626.)

"It is leaſum to all our ſoverane lordis liegees to uſe and exerce ony induſtrie within ye flood mark of ye ſea; *quia uſus littoris eſt communis omnium.* And thairfor gif ony man has ony landis lyand adjacent and contigue to ye ſea, he may not ſtop nor mak impediment to ony perſoun to gather wilkis, cockles, limpettis, muſcles, and uther ſmall fiſh, or bait for taking of fiſh, upon ye ſandis or craigis within ye flood mark foirauent his landis. 24th May 1549, the Town of Craill againſt Greſill Meldrum, i t. c. 680." (Ibid.)

"Na man havand landis pertenand to him, lyand adjacent to ye ſea, may mak ſtop, troubill, or moleſt ye king, or his lieges, to win ſtanes, quarrel, or ony uther thing to h awin profit or commoditie within flude mark of the ſea foirantent ſ ſaidis landis, except he quha ſhop ye *uther be ſpeciallie infeft within ſaid flood mark*, als weill as without ſamin. 29th July 1500. The Kh againſt the Laird of Seafield." (I

[r] Erſk. B. ii, t. 6, § 17.

[s] Sir James Grant againſt the du of Gordon, 9th March 1781. Th river Spey is navigated by rafts, a the inhabitants of the adjacent cou try have for ages made uſe of it f conveying downwards to the ſea th timber and other commodities. Th duke having interrupted the navig tion by ſome erections of cruives f his ſalmon fiſhing, ſome adjac heritors brought a proceſs of d clarator, concluding to have it fou "that they had a right at all tim to ſend floats of timber down th river, and to the navigation there of, in every way of which it w capable, and to have every obſtru tion to this right removed; an that the duke of Gordon ſhould obliged to remove all dikes, bu and other bulwarks impeding t navigation, and ſhould be prohibi from erecting ſuch for the future The learned reporter ſays: "T court, in giving their opinions, n not ſeem to regard the diſtinction twixt public or navigable, and pri

uption is allowable [t]; and highways and bridges, which, the ſame reaſon, the king cannot demoliſh, unleſs that ſure ſhall become neceſſary for the public ſafety, in caſe hoſtile invaſion, or other ſuch exigency [u]. § 3. DIVISION OF THINGS —PUBLIC.

r the king may, by a ſpecial grant, transfer the right public ferry or a free port: the grantee, on the one having right to levy anchorage, ſhore dues, and other reaſonable impoſitions; and, on the other hand, being l to keep boats for the accommodation of the public, he harbour in ſufficient repair. In like manner, the n can grant a right to the wreck or ſea-ware and ſea- within the ſea-mark [x]; or a right to a muſſel-ſcalp, in the ſea or public rivers [y]; the patrimonial advan- which ariſe from ſuch rights being conſidered as *regalia* s. Such alſo are foreſts, woods, and parks, (or large of ground where deer have been in uſe to be kept [z];) —REGALIA MINORA.

They conſidered a river, by the produce of the country e tranſported to the ſea, to be c benefit entruſted *to the king r patriæ, for the behoof of his in general, which could neither e away, nor abridged by him;* at this tranſportation, as the ad primary uſe of the river, if atible with the cruive fiſhing, prevail over it. They were, ſame time of opinion, that ights were not incompatible, emuloufly uſed, and therefore led to fix certain regulations, ng to which they were to be d."

James Colquhoun againſt the Montroſe and the magiſtrates sbarton, 21ſt December 1793, , "no length of poſſeſſion can e any obſtruction to the navi- gation of a public river." Obſerved on the bench, "every heritor through whoſe lands a public river runs, has a right to all the ordinary uſes of it, but the channel is *juris publici*. The crown may give a right of ſalmon fiſhing, but it can give no right of placing any permanent obſtruction in the channel. The crown may, indeed, under certain regulations, and which are intended partly for the benefit of the heritors, grant a right of cruives." This, however, is to be conſidered as an exception from the common law. (Fac. Col.)

[u] Erſk. B. ii, t. 6, § 17.

[x] 15th June 1769, magiſtrates of Culroſs againſt the earl of Dundonald.

[y] 6th July 1764, Sir Ludovick Grant againſt Roſs of Kilravock. (Lord Kaimes' Sel. Dec. 218.)

[z] Erſk. B. ii, tit. 6, § 14.

§ 3. DIVISION OF THINGS —PUBLIC. —REGALIA MINORA.

and ſalmon fiſhings which are not carried by charter w out an expreſs clauſe; but the ſalmon themſelves, like o game, belong to the catcher. Large whales, and ſuch l ones as may not be drawn from the water to the ne part of the land on a wain with ſix oxen, belong to the as royal fiſhes[a]. So, in like manner, treaſures hid u ground, ſtrayed or waif cattle, if no owner appear witl year, belong to the king, or to the ſheriff as his *donator*: wi goods, that is, where the wreck has been ſo total, that nc ing creature has eſcaped alive[b], fall under the rights of miralty.

Treaſure.

Wreck.

—RES UNIVERSITATIS.

RES univerſitatis, which our writers take notice of the civilians, are things proper only to a corporation or or trading company; as town houſes, market places, &c. Such is the more general claſſification, which may here fice, without purſuing things (as poſſeſſed by individ through their various other deſcriptions, ſuch as heri and moveable, urban and rural.

[a] Leg. Forreſtarum, § 17. But no whales have, for at leaſt a century paſt, been claimed either by the king, or by the admiral his donatary, but ſuch as were of a ſize conſiderably larger than that there deſcribed. 17 Ed. II, c. 11.

[b] This right has ſeldom been ſtrictly enforced; the property is reſtored to the owners, claiming within a reaſonable period, and paying a ſalvage. In the caſe of ſtranded veſſels, it is the duty of juſtices of peace, and all other magiſtrates and officers of the law, to give their aſſiſtance in ſaving and protecting the veſſels and cargoes for thoſe intereſted therein, under abundance of ſtatutes, as acts 12 Anne, ſeſſ. 2, c. 18; 4 Geo. I, c. 12; 26 Geo. II, c. 19. They are directed to command the conſtab ſummon as many men as ſhe thought neceſſary for the aſſiſta the ſhip.

A veſſel was lately ſtrand Orkney. An agent for the o was taking meaſures for ſellin cargo. The vice-admiral-depu terdicted him from doing ſo. court of ſeſſion found the whol ceedings of the ſaid vice-admir procurator fiſcal, tending to ob the ſale, were illegal and unwa ed, and found the defender quently liable in damages. In 1805, Courney againſt the vi miral of Orkney and Shetlan vice-admiral-depute, and the curator fiſcal.

4

CHAP. II.

Common Property.

§ 1. IN GENERAL.

) IGHTS in common, as *matres diſcordiarum*, are no l favourites of the Scottiſh law, which, indeed, ɔſes chiefly to diſſolve them, and ſeparate the intereſts ividuals. The wiſe and ſalutary expedient, ſo happily l for attaining this object in the caſe of landed pro- poſſeſſed in commonty, will come under our view ; other meaſures employed for the improvement of the y. Here, however, it may be proper to take notice :h rights and obligations as obtain in thoſe inſtances, : the community does not admit of being ſeparated and ed.

§ 2. TENEMENT WITH DIFFERENT FLOORS BELONGING TO DIFFERENT PROPRIETORS.

WHERE the different floors of the ſame tenement be- to different proprietors, " the houſe cannot be ſaid to r a full or complete diviſion. The proprietor of the nd-floor is bound, merely by the nature and condition is property, without any ſervitude, not only to bear the ght of the upper ſtory, but to repair his own property,

§ 2. TENEMENT —COMMON.

that it may be capable of bearing that weight; for, in that caſe, as the roof remains a common roof to the whole, and the area on which the houſe ſtands ſupports the whole, a communication of property neceſſarily ariſes, by which the proprietor of the ground-ſtory is obliged to uphold it for the ſupport of the upper, and the owner of the upper muſt uphold that as a roof or cover to the lower [a]." Where the property of the higheſt ſtory is divided into ſeparate garrets, among the different proprietors, each proprietor muſt, by this rule, uphold that part of the roof which covers his own garret. But "proprietors of upper ſtories of a tenement have not an implied ſervitude on thoſe below, to the effect of preventing the owners of the laſt from making ſuch alterations on their reſpective parts of the walls as do not endanger the reſt of the building [b]."

Alterations.

§ 3. WATER.

III. THE moſt difficult and important queſtions, touching common rights, occur in the caſe of rivulets and ſtreams, in which the different proprietors, through whoſe grounds they paſs in their courſe to the ſea or to ſome public river, have a common property or intereſt [c].

IF the river divide the properties of different perſons, no one proprietor cannot divert any conſiderable portion of it without the conſent of the other [d].

[a] Stat. B. ii, t. 7, § 6.

[b] Robertſon againſt Ranken, 3d March 1784.

The alteration in this caſe was, ſtriking out ſome doors and windows in the ground floor, which the dean of guild found could be done without any danger. But in a late caſe, Murray againſt Watt, ſummer-ſeſſion 1805, where the alterations were attended with riſk, and had occaſioned rents in the walls, the owner of the ground ſtorey, by whom they were made, was found liable in damages to the proprietor of the upper ſtorey.

[c] As to the polluting of running water, ſee *ſupra*, p. 88.

[d] This has been often decided, particularly in the caſe of Hamilton of Weſtburn, which has always been held as a leading deciſion.

"A few miles above Glaſgow the Clyde ſeparates Mr. Hamilton's land of Weſtburn from Mr. Dunlop's

f the ſame perſon is proprietor of the grounds on
es of the river, he can change its channel as he
provided he reſtores it to its old channel before it
e ground.

§ 3. COMMON PROPERTY —WATER.

ſuperior proprietor cannot take away any part of
r ſo as to make the run leſs when it enters the
f the inferior proprietor. However, as much wa-
be taken from a river by a pipe as can be uſed by
y and cattle[e]; but "not ſo much as to ſupply a
f."

ıot lawful even to interrupt the natural courſe of a
collecting the water in a reſervoir, and allowing it
lown at intervals; although, upon the whole, the
of water paſſing to the inferior proprietor be not
:d. The latter is entitled to complain of the injury
ıs by its being made to flow to him unequally[g].

Courſe of the water not to be interrupted.

. Above Mr. Hamilton's dam-dike runs acroſs the which two oppoſite mills l with water, one of them to Mr. Dunlop; but the it ſupply both return into fore it reaches Mr. Hamilrty. Edington and Comuſed Mr. Dunlop's mill, ed to enlarge the canal ver, ſo as to bring about a t leaſt a very conſiderable ı river's water, to turn ngines, which operation y the ſtream ſo diverted ft Mr. Hamilton's proheſe operations Mr. Haught a ſuſpenſion, and : without his conſent no river could be diverted. the oppoſition is entirely emulous, as the river, after the propoſed operations, will ſtill be much more than ſufficient for every purpoſe, both of utility and pleaſure. The lords ſuſpended the letters, 5th March 1793, Hamilton *contra* Edington and Company." (Dict. Vol. iv, tit. Property, p. 175.

[e] 24th Nov. 1791, Ogilvy againſt Kincaid, Dict. Vol. iv, t. Property, p. 175.

[f] Ibid.

[g] Sir W^m. Millar againſt Gordon, March 10, 1804. "The river Ayr runs through the park and pleaſure grounds of Barſkimming, ſupplying with water two mills on the eſtate, the one by means of a looſe parapet of ſtone thrown acroſs the river a little below its junction with a ſtream called the Lugar; and the other a flax mill, by

COMMON PROPERTY —WATER.

THE inferior proprietor, again, cannot erect any buil

a dam conſtructed farther up the river, and before the confluence of the two ſtreams.

About two miles above Barſkimming mill, upon the eſtate of a neighbouring heritor, there had been formerly a corn mill, which many years ago was converted into a cotton manufactory, and the original dam was upon that occaſion conſiderably enlarged, on account of the additional ſupply of water neceſſary for the machinery. And, in the year 1801, there was conſtructed a large reſervoir, occupying an acre of ground, for the purpoſe of accumulating the water during the night, when the ſtream in its natural ſtate was inſufficient for ſupplying the machinery. The water was thus collected and let out as found neceſſary, ſo that even in a dry ſeaſon there was a regular ſupply for the purpoſes of the manufacture. But while the water was accumulating, no part of it was allowed to paſs down the channel of the river. With the view of obtaining a ſtill farther command of water, the proprietors of the cotton-work, in the year 1802, were proceeding to conſtruct another reſervoir of larger dimenſions, which would have been attended with the ſame effect in a ſtill greater degree, when the proprietor of Barſkimming raiſed a ſummons of declarator againſt the company, concluding, "That the purſuer has, in virtue of his rights and infeftments, and poſſeſſions for time immemorial, good and undoubted right and title, to the full, free, and uninterrupted benefit and enjoyme whole of the water of t ſaid rivers of Ayr and Lug uſes to which an heritor n fully employ the water o which runs through his la particulary for the uſe of mill of Barſkimming accordi and wont; and that the pro the cotton-work had no rig whatſoever to make any re reſervoirs, or other *opus ma* for the purpoſes of diverti reſting and detaining the the river, and keeping the ſ med up, and thereby ſto courſe, and preventing th for a time, from returning ordinary and accuſtomed through the purſuer's prope being ſo found and declare proprietors ought and ſhou cerned and ordained inſtan moliſh all ſuch reſervoirs already made, and ſhould hibited and diſcharged fr after making any reſervoir *opus manufactum*, whereby t of the river may be diverte bed for a time, or detaine reſted in its bed, and preve continually returning the running therein, through ſuer's property, with its accuſtomed current, accord immemorial uſe and wont beneſit and uſe of the purſ in all lawful particulars w and eſpecially for the uſe mill of Barſkimming, in coming," &c.

the channel or alveus of the river, or carry on any operation, ſo as to make the water regorge either upon the ſuperior proprietor or the proprietor of the oppoſite ſide [b].

It has been "found lawful, however, to build a fence by the ſide of a river, to prevent damage to the ground by the overflow of the river, though thereby a damage ſhould happen to" the "neighbour, by throwing the whole overflow in time of flood upon the oppoſite ſide [i]."

In complaining of ſuch illegal uſes of water, it is not ne-

The court (25th Nov. 1803) being aſſiſted, from the ſtatements on both ſides, that the operations of the defenders muſt be attended with prejudice to the inferior heritor, pronounced the following interlocutor:

"Repels the defences, and find, ſuſtain, and declare, in terms of the libel; ſuperſeding extract till the 3d Juriſdict day in May next; and further, prohibit the defenders from hereafter uſing any reſervoir or other *new manufacture*, whereby the ſtream of the river may be diverted from the uſe for a time, or detained or arreſted in its bed, and prevented from naturally running therein through the purſuer's property; and allow an interim decreet to go out and be extracted, for giving immediate effect to this prohibition." Fac. Coll.

[b] The earl of Eglinton erected a dam-dike, for the uſe of a mill upon the river of Irvine, in conſequence of which the water ſometimes regorged and came back, to the detriment of a mill belonging to a ſuperior heritor, who, on that account, brought a proceſs for having the dam-dike demoliſhed. Urged for the defender, that as he had done a lawful act, the purſuer was not entitled to complain of an accidental damage, eſpecially as it could be remedied by raiſing the purſuer's mill-wheel ſomewhat higher, which the earl offered to be at the expence of doing for him. The lords found, that the defender could not, without conſent of the purſuer, build a dam-dike acroſs the river, ſo as to cauſe the water reſtagnate on the waygang of the purſuer's mill, or thereby hurt the going of the mill-wheel in the way it uſed to go formerly; and found, that the purſuer is not obliged to alter or ſuffer any alteration on the form of his mill; and they ordained the dam-dike to be taken down ſo far as it occaſions a reſtagnation prejudicial to the ſuperior mill. (MS. 5th June 1744, Rem. Dec. and Kilkerran, 26th Jan. 1744, Fairly *contra* Earl of Eglinton.

[i] Kilkerran, 25th June 1741, Farquharſon againſt Farquharſon.

§ 3. WATER.

ceſſary to allege any patrimonial loſs, ſuch as injury to mill, fiſhery, or otherwiſe. A proprietor is entitled to enjoy his rivulet *amœnitatis cauſa*, which gives him a legal ground of action.

Amœnitatis cauſa.

NEITHER is this limited to the immediate inferior proprietor, but belongs to any other proprietor who ſuffers the injury.

So far the principles are abundantly clear.

If the river of itſelf leaves its channel.

IF the river, without any human operation, but owing to ſome natural cauſe, changes its courſe, the proprietor who is deprived of the benefit of it, may, *de recenti*, at his own expence, bring it back to its old channel [k].

[k] Magiſtrates of Aberdeen againſt Menzies of Pitfoddels, 22d November 1748, *voce* Property. Kilkerran, No. III.

"The river of Dee had broke in upon the bank belonging to Menzies of Pitfoddels, he by a ſtrong battery prevented its taking a new channel through his ground; and this battery firſt begun about 70 years ago, was from time to time kept up and repaired till about the year 1731, that being neglected, the river broke in ſo as to make two channels, one of which ran through Pitfoddles' ground, and, after forming an iſland, returned again below to the old courſe, in which another branch of the river always did continue to run.

"As by this Pitfoddles had loſt a ſmall ſalmon-fiſhing, he now began again to repair the battery his predeceſſors had made, and for many years kept up, in order to reſtore river to its antient channel.

"Being interrupted by a ſuſpen at the inſtance of the proprieto the oppoſite bank on the north of the old channel, at diſcuſſing th of, after proof led, the lords fo 'that in this caſe, Pitfoddles ha right to alter the ſouth *alveus* in judice of the ſuſpenders.'

"The prejudice lay moſtly in that the old *alveus* being now filled up than it was before, a pi the river had diverted from its c which, when ſent back again, occaſion a greater overflow i point the judgment was chiefly upon, was, that though he might reſtored the river to its channel *centi*, he could not do it *post tempus*. What length of time that ſufficient, muſt in the nat the thing be arbitrary."

ume of water only, either by calculating its capacity, as many cubical yards, or by ſuperficial meaſure, for 20 of water; or by general deſcription, as for a pond, a courſe, or a rivulet: but I muſt bring my action for nd that lies at the bottom, and muſt call it 20 acres of overed with water. For water is a moveable wander- ing, and muſt of neceſſity continue common by the f nature; ſo that I can only have a temporary, tran- uſufructuary, property therein. Wherefore, if a body ter runs out of my pond into another man's, I have no to reclaim it. But the land which the water covers is ment, fixed, and immoveable: and, therefore, in this I ave a certain ſubſtantial property; of which the law ke notice, and not of the other[m]."

E right then of bringing back *de recenti* the river to its annel, ſeems to be founded leſs on legal than equit- onſiderations. The one proprietor has ſuſtained a loſs, her gained an advantage, unexpectedly. We readily thiſe with the former, who may have paid a higher price e eſtate, or have been in the habit of putting a higher upon it on account of that advantage; to recover which cent attempts appear excuſable. But if he make no its *de recenti*, it is plain he does not feel for himſelf.

§ 3. WATER. There is no room therefore for equity to interfere. It will not ſupport his attempts, after a long interval, to recover it. But if the current has been changed by the other proprietor, and not by a natural cauſe, it may be brought back any time within 40 years.

CHAP. III.

Of Servitudes.

SERVITUDE is a burden affecting land, or other heritable ſubject, whereby the owner is reſtrained from the full uſe of his property, or whereby another has right to do ſomething upon it. The general doctrine, and indeed with few exceptions, the particular ſervitudes, we have derived from the Roman juriſprudence. Hence the ſimilarity in this particular between the Scottiſh code and that of the greateſt part of continental Europe: whereas our neighbours in England have not, in their law, any ſuch name or *nomen juris* as *ſervitudes*. With them ſuch rights, it is ſaid, "would fall to be conſidered under the head of eaſements or nuiſances." For, (ſays the learned profeſſor of civil law in the univerſity of Dublin, taking notice of the defect), "ſo the ſervices of the Romans would be claſſed by us[a]." And the rights of *paſture*, of *fiſhing*, of *turf*, of

§ 1. IN GENERAL. What is it

[a] Lectures of Arthur Browne, eſq. B. i, Lect. 11, p. 138.

§ 1. IN GENERAL.

way, are treated of by judge Blackſtone [b], along with no leſs diſſimilar than *offices* and *dignities*, under one c denomination of *incorporeal hereditaments* [c].

Natural.

Legal.

Conventional.

Grant,

by preſcription.

Negative.

SERVITUDES are either natural, legal, or conve Nature itſelf may be ſaid to conſtitute a ſervitude upc rior tenements, whereby they muſt receive the wat falls from thoſe that ſtand on higher ground. Leg tudes are eſtabliſhed by ſtatute or cuſtom, from c ations of public policy. Conventional ſervitudes are tuted either by grant, where the will of the party b is expreſſed in writing, or by preſcription, where his is preſumed from his acquieſcence in the burden for 4 In ſervitudes that may be acquired by preſcription, 4 exerciſe of the right is ſufficient, without any title ing, other than a charter and ſaſine of the lands, t the ſervitude is claimed to be due. Negative ſervitu not admit of any viſible uſe, but it has been fou they do affect ſingular ſucceſſors. The law has p no record for ſervitudes; but purchaſers muſt inq truſt to the warrandice of their authors, if there be due concealment [d].

SERVITUDES conſtituted by grant are not effect queſtion with the ſuperior of the tenement burden the ſervitude, unleſs his conſent be adhibited; for a cannot be hurt by his vaſſal's deed. But where the ſ is acquired by preſcription, the conſent of the whoſe right afforded him a good title to interrupt, i

[b] B. ii, c. 3.

[c] "Incorporeal hereditaments, in the Engliſh law, may be defined to be ſuch rights and eſtates deſcending, or capable of deſcending, in fee-ſimple or fee-tail; of which the merely ideal, and not the our outward ſenſes." (V Viner. Lectures, Vol. ii, p

[d] See p. 387.

tude by grant, though followed only by a partial pos- § 1. IN GENERAL.
muſt be governed, as to its extent, by the tenor of
nt; but a ſervitude by preſcription, is limited by the
: or degree of the uſe had by him, who preſcribes
ly to the maxim *tantum præſcriptum quantum poſſeſſum.*
o general claſſes of ſervitudes are, perſonal and real,
lial. In the one caſe *prædium ſervit perſonæ*, in the
rvit prædio.

AMONG the Romans there were three perſonal ſervi- § 2. PERSONAL SERVITUDES.
ıſufruct, uſe, and habitation. The firſt only is known
practice.

FERENT or uſufruct "is a right to poſſeſs and enjoy —LIFERENT.
ole benefit of ſubjects belonging to another in fee,
one's life, without prejudicing the ſubſtance, fee, or

A liferent cannot, therefore, be conſtituted upon In what things may it be conſtituted?
which periſh in the uſe; and though it may upon
ı which gradually wear out by time, as houſehold
re, &c. yet with us it is generally applied to heritable
ı. He, whoſe property is burdened, is uſually called Fiar.
r.

RENTS are either conventional or legal. Conventional Conventional,
s are either by reſervation, that is, reſerved by the
tor in the ſame writing by which he conveys the pro-
ı another, or by a ſeparate conſtitution by the proprie- By conſtitution.
avour of ſome other perſon. This latter is called a
liferent, and is leſs favoured than the other. It re-
ſaſine in order to affect ſingular ſucceſſors: whereas
prietor's former ſaſine ſupports his liferent by reſerv-
and a liferenter by reſervation may enter heirs or ſin- By reſervation.
ucceſſors of vaſſals, as if he were fiar, and is entitled
caſualties of ſuperiority that fall during his life; his

§ 2. PERSONAL —LIFE-RENTS.

right being more amply interpreted than that of a liferenter who had no prior intereſt in the lands [d].

Legal, terce, courteſy.

LEGAL liferents are the terce and courteſy which v already taken ſome notice of.

Salva rei ſubſtantia.

LIFERENTERS muſt uſe their right *ſalva rei ſubſtant* thereſore cannot cut growing timber, nor work c minerals [e]. But where a coppice or *ſilva cædua* has b vided into hags, one of which was cut annually by t prietor, the liferenter may continue the former yea tings; becauſe theſe are conſidered as the annual fru ſubject was intended to yield, and ſo the proper ſub a liferent.

Burdens

LIFERENTERS are directed to find ſecurity (*cautio tuaria*) that they ſhould keep the ſubject in good conditi ing the liferent [f], under the penalty of loſing the profit of [g]. A ſpecial method is chalked out in the caſe of ten within borough [h]. Liferenters are alſo burdened w alimony of the heir, where he has not enough for m ing himſelf, which is founded in an extenſion of clauſe of act 1491, c. 25; by the firſt part whereof, ly ward-ſuperiors, but liferenters were obliged to pre good condition, the ſubject of the ward or liferent. renters are alſo ſubjected to the payment of the yearl ſtipends, &c. falling due during their right, and to a burdens that attend the ſubject liferented.

[d] Erſk. B. ii, tit. 9.

[e] If the grant generally expreſs the right of working coals, the liferenter may work any colliery that had been opened before the commencement of his right, provided he does not employ a greater number of colliers, or bring up a greater quantit than the proprietor did. (E tit. 9.)

[f] 1491, c. 25.

[g] 1535, c. 15.

[h] 1594, c. 226.

§ 2. PERSONAL —LIFE-RENT.

THE liferent is extinguiſhed by the liferenter's death. hat part of the rent which the liferenter had a proper right o before his death falls to his executors; the reſt, as never aving been in *bonis* of the deceaſed, goes to the fiar. Marinmas and Whitſunday are, by our cuſtom, the legal terms f the payment of rent: conſequently, if a liferenter of land rvives the term of Whitſunday, his executors are entitled o the half of that year's rent, becauſe it was due the term efore his death; if he ſurvives Martinmas, they have a ght to the whole. And this is the rule, though the conentional term ſhould be after Martinmas; for ſtill the rent, hough not payable, was due while the liferenter was yet live, and the poſtponing the term of payment cannot hurt he right of the executors[a]. A liferenter, who outlives any art of the term day, tranſmits to his executors the right to hat term[b].

If he ſurvive Whitſunday.

If Martinmas.

If the conventional term be different.

IF the liferenter, being in the natural or perſonal poſſeſſion, nd having firſt ſowed the ground, ſhould die, even before the Whitſunday, his executors are entitled to the whole crop, in reſpect that both ſeed and induſtry were his[c].

LIFERENTS of mills, though their fruits are continual, *de in diem*, are governed by the ſame rule with liferents of land[d]. Mills.

IN a liferent of money, conſtituted by a perſonal bond, the executors have a right to the intereſt, down to the very day of the liferenter's death, where no terms are mentioned for the payment thereof; but in the caſe of an heritable bond, or of a money liferent ſecured on land, the intereſts of liferenter and fiar, (or of heir and executor, for the ſame Of money.

[a] Gosford, 24th July 1668, Carnegy.

[b] F. 8th Dec. 1704, Paterſon.

[c] 25th July 1671, Guthrie.

[d] 8th Dec. 1617, Guthrie.

§ 2. PERSONAL —LIFE-RENT.

rules ſerve to fix the intereſts of both), are governed by t legal terms of land rent [e], without regard to the conve tional [f].

§ 3. PREDIAL SERVI-TUDES.

III. PREDIAL or real ſervitudes are either urban or rur This diſtinction depends not upon the ſituation, but the u of the ſervient tenement; urban ſervitudes, meaning tho which relate to houſes, though ſituated in the country, a for example, a dwelling-houſe and offices built for the u of a farm; and, on the other hand, rural ſervitudes regardi land wherever ſituated, as, for example, a field or gard within the liberties of a city.

THE chief urban ſervitudes among the Romans we *tigni immittendi*, or the right of fixing in our neighbou wall a joiſt or beam from our houſe, and *oneris ferendi*, the right of reſting the weight of one's houſe upon t neighbour's wall; both which Mr. Erſkine terms a ſervitu of ſupport, the general nature of both being the ſame. A the eſſential difference between them lay in the preciſe for of words that the Romans uſed in conſtituting the ſervitu *oneris ferendi*, viz. *Paries oneri ferundo uti nunc eſt, ita ſit*; which words, againſt the general rule of ſervitudes, t owner of the ſervient tenement was bound to repair it, u leſs he choſe to throw up the property altogether. But lo Stair and Mr. Erſkine concur in opinion, that with us t owner of the ſervient tenement is not bound to repair unleſs he has come under ſuch an obligation [g].

[e] 11th Jan. 1738, Carruthers.

[f] 12th Jan. 1681, Trotter.

[g] Erſk. B. ii, t. 9, Bruce, 108, 117. Where different floors or ſtories of the ſame houſe belong to different perſons, the property of the houſe cannot be ſaid to be entirely divided; the roof remains a common roof to the whole, and the area on which t houſe ſtands ſupports the whole; that there is a communication of p perty, in conſequence of which t proprietor of the ground floor m without the conſtitution of any ſer tude, uphold it for the ſupport of t upper, and the owner of the high

LICIDE is that ſervitude by which a proprietor is en- § 3.
throw the rain water falling from his own houſe PREDIAL —URBAN.
itely upon his neighbour's ground. But if the water Stillicide.
in his own property, though at the ſmalleſt diſtance
e march, the owner of the inferior tenement muſt
t, that being a ſervitude conſtituted by nature itſelf.

ervitudes *altius non tollendi, et non officiendi luminibus* *Altius non*
ætui, reſtrain proprietors from raiſing their houſes *tollendi.*
a certain height, or from making any building what- Light.
nat may hurt the light or proſpect of the dominant
it [h]. Negative ſervitudes cannot be conſtituted by
:ion alone. A proprietor may have built his houſe
ow, or not have built at all upon his grounds for 40 By pre-
gether; but this will not prevent him from after- ſcription.
uilding a houſe on his property, or raiſing it to what
e pleaſes. Such ſervitudes, however, affect ſingu-
:ſſors [i].

of the chief rural ſervitudes is the privilege of paſſ- —RURAL.
s the Romans had their *iter*, *actus*, *via*, ſo we have
ath, a horſe road, a cart or coach road, and ways or
by which cattle may be driven from one field to
, which terms correſpond nearly to the other; only,

ſt uphold that as a cover to
. Where the higheſt floor
into garrets among the
oprietors, each proprietor is
ccording to this rule, to up-
part of the roof which co-
en garret. Stair, 2, 7, 62.
, 15, De ſerv. prœd. urb.
nd feued to Gray a piece
d to build a houſe. In the
it was ſtipulated that he
o erect any building on the
contiguous property on the north, ſo
as to interrupt the light of Gray's
houſe: That contiguous property
Clelland thereafter, but without men-
tioning the ſaid ſtipulation, feued out
to Ferguſſon, who, many years after,
began to build thereon. Gray ap-
plied for an interdict. The court
found the ſervitude effectual. 31ſt
Jan. 1792, Gray againſt Ferguſſon.
Dict. v. iv, Servitude.

§ 3. PREDIAL —RURAL —PRIVATE WAYS.

in claſſing theſe roads, the Romans looked to the bre thereof, we look to the manner of uſing them [i].

THESE deſcriptions of private ways are conſidered ſervitude upon property, and muſt be conſtituted, eithe ſpecial grant, or by immemorial uſage, that is, for more 40 years back [k]. It is not every uſage of traverſing a ſon's property that is underſtood to conſtitute a ſervitu The ſmall proprietors of town acres, after their corn i down, generally lead it, each through his neighbour's gro this, though done for 100 years, will not infer a ſervitu In like manner, a *ſervitus ſpatiandi*, or walking in an field, was not ſuſtained from uſe and wont [n].

i Erſk. Inſt. B. ii, t. 9, § 12.

k Action for a ſervitude of a road to the pariſh kirk through grounds, whether laboured or lying fallow, was ſuſtained "on immemorial uſe without writing;" but "the lords found, that that poſſeſſion ought to be proven to be immemorial, and paſt memory of man, and would not ſuſtain the offer to prove poſſeſſion *for* 30 *or* 40 *years*." Durie's Deciſions, Neilſon againſt Sheriff of Galloway, 27th June 1623. By this muſt have been meant leſs than 40 years.

l For 40 years Thomas Purdie had been in the uſe of bringing home his corns, after harveſt, through a ridge of Steil and his authors, after their corns on the ſaid ridge were cut down. This, however, was found not to eſtabliſh a ſervitude. Kilkerran, *voce* Servitude, No. 3.

m Kilkerran, *voce* Servitude, No. 3, 20th July 1749.

n Cochran againſt Fairholm, 8th February 1759. Fac. Coll. "The Bruntsfield links, an open piece of paſture ground belonging to th of Edinburgh, had been uſed b inhabitants of Edinburgh, for immemorial, for playing at goll walking. A little bit of the moſt r and uſeleſs part of this field was out to Mr. Fairholm. He beg incloſe it, but was ſtopped by a plaint exhibited to the ſheriff b Cochran and others, proprieto houſes and yards conterminous links, ſetting forth, that they, predeceſſors, and authors, ha quired a ſervitude *ſpatiandi* of ing themſelves in this field.

"Pleaded for Fairholm, pe ſervitudes are not received in law of Scotland; there muſt a be a dominant tenement where is a ſervient ... And, in the c the town of Dunſe, 22d Nov. it was found that the town cou acquire a rural ſervitude, as neither property in lands nor h

"Mr. Cochran, finding th ſheriff was diſpoſed to deu againſt him, advocated the ca

§ 3. PREDIAL —RURAL —PRIVATE WAYS.

rUDES muſt be uſed in the manner leaſt hurtful. : example, in a ſervitude of feal and divot, the pro- a ſervient tenement, has been found not precluded te part of the muir ſubjected to the ſervitude, pro- icient were left for the purpoſes of the dominant °. But he cannot hurt the ſervitude; as for ex- y putting up a gate on a road, where formerly none. A moveable ſtile, however, may be put path, that being no injury but rather beneficial to aſſengers. Lord Kilkerran reports a deciſion of the ſſion, finding that the proprietor, through whoſe there had been immemorially a road to church, ut it up, on his making another footpath equally ous, at the ſight of the ſheriff, or of any two juſtices

ſeſſion. "The lords re- ill." (Fac. Coll. p. 293. ate caſe, concerning the Andrews, decided in ſum- 1805, the title of individ- nts of that place, to pre- ptions of the liberty of the links was ſuſtained; were entertained of the he caſe of Cochran.

rt of ſeſſion found, that nts of Kelſo, from imme- had acquired a right of f bleaching and drying : iſland of Ana. This de- everſed on appeal. July Jaffray againſt duke of

However, a ſervitude of nature has been ſince ſuſ- the decree affirmed on eb. 10, 1799, Dict. v. iv,

n of Dunnykier againſt his ſt June 1667; Dirleton, D. e lords conſidering that it was intended that the ſaid ſervitude ſhould only be for the end foreſaid, and it would be a prejudice both to the public intereſt which it concerned, that the country ſhould be improved, and waſte unprofitable grounds laboured, and to the purſuer alſo, without the leaſt advantage to defenders: they therefore ordained as much ground to be ſet apart as might more than ſufficiently ſerve for the uſe foreſaid, and allowed the purſuer to labour and improve the reſt, without prejudice to the defenders, to make uſe even of the reſt during the time it continueth in the preſent condition and not laboured; and, in caſe it ſhould happen upon any occaſion that what ſhould be ſet apart for the feuars uſe aforeſaid, ſhould prove ſhort and not ſufficient for that uſe, they reſerved liberty to them to have recourſe to the reſidue, and granted viſitation to the effect foreſaid."

§ 3. PREDIAL. —RURAL. —PRIVATE WAYS.

of peace of the diſtrict [p]. He remarks, however, that "the caſe had ſome ſpecialties in it, which may have been thought to bring it nearer to the caſe of an indefinite ſervitude [q]."

THE road muſt be kept in repair by thoſe who are expreſsly bound to do ſo. The public funds cannot be applied for that purpoſe.

THE proprietor of the dominant tenement having a kind road through a ford, was found at liberty to build a bridge over it, although he was not proprietor of the ground on both ſides of the water on which the bridge was founded [r].

—PASTURE.

THE *jus paſcendi pecoris* [s] is that ſervitude whereby the "owner of the dominant tenement is entitled to the uſe of the graſs grounds of the ſervient, for paſturing a determinate number of cattle proper to the dominant [t]." Agreeably to the general rule of conſtruing all ſervitudes, this right is not to be ſo ſtretched as to exclude the owner of the ſervient tenement from paſturing his own cattle on them, if there be graſs enough for both, unleſs where the full and exclusive benefit of the graſs is, by the expreſs conſtitution of the ſervitude, granted to the dominant tenement.

How uſed.

Conſtitution. Grant. Preſcription. Perſonal obligation.

THIS right of common paſturage may be eſtabliſhed either by grant or by preſcription. In the firſt caſe, it is ſometimes conſtituted by a perſonal obligation granted by the owner of the ſervient tenement; which, when it is followed by poſſeſſion, is effectual againſt his ſingular ſucceſſors; but moſt frequently by a clauſe of common paſturage contained in the charter of the dominant tenement [u].

[p] Bruce againſt Wardlaw, 25th June 1748, tit. Servitude, No. 2.

[q] Ibid.

[r] Lord Stair, B. ii, tit. 7, § 10.

[s] Lib. iv, De Serv. pr. Ruſt.

[t] Erſk. B. ii, tit. 9, § 14.

[u] This clauſe, *cum communi pa* is often indefinite without mea

n pasturage may be constituted by prescription e. by the uninterrupted exercise of that right for together, upon lands contiguous to his own, up- ner title than a general clause in his charter, *cum astura*, even though no such right had been com- his author in those lands. Nay, a right of pastur- be effectually constituted by the common clause of pertinent, without the aid either of prescription or e of pasturage[y]. § 3. PREDIAL —RURAL —PASTURE. Common pasturage. How constituted? Part and pertinent.

a right of common pasture, over the same ground, o the contiguous proprietors, the number they are ly entitled to feed upon it, if that has been left in- is in proportion to the number and nature of the h can fodder during winter on the dominant tene- nich proportions may be fixed by an action of *soum- ming*. Numbers each may feed on common pasture. General rule.

ave two predial servitudes to which the Romans ngers. The one is the servitude of *feal and divot*; liberty of digging turf upon another's ground. t results from necessity, being given for thatch to t's house, and other such purposes of the dominant [z]. —FEAL & DIVOT.

like to this is the servitude of fuel; which is a —TURBARY.

rient tenement to be bur- the pasturage; and is ded to convey all pastur- had been appropriated to lisponed previously to the charter, whether it was the lands belonging to the out of other lands. If the ecial, expressing the parti- which are to be burdened, le is effectually constituted on these lands, if the granter of the charter was proprietor of them, and so had a power to burden them; but if they were the property of a third party, the clause carries no farther interest in them to the grantee than the granter himself was entitled to. (Ersk. B. ii, tit. 9, § 14.)

[y] Ersk. B. ii, tit. 9, § 16.

[z] Ibid.

§ 3. PREDIAL —RURAL —TURBARY.

right of raiſing turf or peats from the ſervient moſs or p land, for fuel to the inhabitants of the dominant teneme Which ſervitude ſeems to be known in England and Irel under the term turbary [a].

A SERVITUDE of feal and divot is not included in a ſer tude of paſture; though the latter is the greater and m valuable of the two: for they are not *ejuſdem generis*.

—THIRL-AGE.

ANOTHER ſervitude unknown to the Romans is thirla by which lands are aſtricted or thirled to a particular m

What is it?

and the poſſeſſors bound to grind their grain there, for p ment of certain multures and ſequels, as the agreed price grinding. In this ſervitude, the mill is the dominant te ment, and the lands aſtricted (which are called alſo the thi

Multure.

or ſucken) the ſervient. Multure is the quantity of grain meal payable to the proprietor of the mill, or to the m

Sequels.

turer his tackſman. The ſequels are the ſmall quantit given to the ſervants, under the name of knaveſhip, h nock, and lock or gowpen. The quantities paid to the m by the lands, not aſtricted, are generally proportioned to t value of the labour, and are called out-town or out-ſuck multures; but thoſe paid by the thirle are ordinarily high and are called in-town or in-ſucken multures.

Different kinds, grindable, *creſcentia*, *invecta et illata*.

THIRLAGE is either, 1ſt, of grindable corns, that is, t corns which the tenants have occaſion to grind, whether for t uſe of their family or for ſale: 2dly, *grana creſcentia*, that the whole grain growing upon the ground, with two exce tions, viz. ſeed and horſe corn, and farm duties [b]: 3dly, *invecta et illata*, that is, all corns imported into the thirle th *thole fire and water*—that is, grain that is ſteeped or dried

[a] Blackſtone, B. ii, c. 3, p. 34.

[b] But if the rent be payable in meal, flour, or malt, the grain of which theſe are made muſt be ma factured in the dominant mill.

but it does not include grain uſed for brewing and it does not extend to flour or meal if the corn be ſo ſtured before it was purchaſed. § 3. PREDIAL —RURAL —THIRLAGE.

poſſeſſors of the aſtricted lands are bound to uphold l, repair the dam-dikes, and aqueducts, and bring ıe ſtones; but, in a thirlage conſtituted by preſcrip- : ſuckeners are not bound to perform ſuch ſervices, ıere has been a uſage to that effect.

ſervitude having been found more vexatious to the y than beneficial to the other, and indeed extremely ial to the agriculture of the country, the ſtatute 39 l, c. 55, allowed it to be redeemed by payment of a ım, to be fixed in the manner therein preſcribed; a d ſalutary proviſion[c]: on the ſame principles with the firſt's celebrated decreet-arbitral, making it law- roprietors to purchaſe their teinds from the titular. ıcedure is ſo diſtinctly and particularly ſtated in the as not to require any explanation. The ſtatute itſelf ed in Appendix I.

[c] See Appendix, No. 66.

CHAP. IV.

Of Ecclesiastical or Church Property, or the Patrimony of the Kirk.

§ 1. IN GENERAL.

I. THE clergy are principally maintained from the t or tithes; which, as being a fund appropriate that purpoſe, are treated of by Sir Thomas Craig unde head of *res ſacræ;* and which, as being truly a ſervitu burden affecting lands, fall, according to Mr. Erſkine[a] turally to be explained after ſervitudes.

But it may be proper, firſt, to conſider thoſe provi which the law has made for the clergy's perſonal accom dation.

§ 2. MANSE.

II. On the eve of the Reformation, the parſons, v and other churchmen, having ſet in feu, or long tacks, manſes as well as glebes, there were no ſufficient dw places for thoſe that ſerved "or ſuld ſerve and miniſter kirkes[b]." In order to remedy this evil, it was ordain

1ſt caſe, kirks where there were parſons or vicars formerly.

[a] B. ii, tit. 10, § 1. [b] 1563, c. 72.

563, c. 72 [c], that "they that are appoynted or to mted to ſerve and miniſter at ony kirk within this ive the principal manſe of the parſon or vicar, or ſa ıgreof as ſall be fundin ſufficient for ſtaiking of the effect that they may the better wait upon the ppoynted and to be appoynted unto them, quhidder gleibes be ſet in feu or tack of before or not; or reaſonable and ſufficient houſe be bigged to them : kirke, be the perſon or vicar or utheris havand the es in feu or lang tackes." This was confirmed by c. 48 [d], declaring that "the manſes outher pertain- : perſone or vicar, maiſt eweſt" (or neareſt) "to the maiſt commodious for dwelling, perteines and ſall the miniſter or reader ſerving at the ſamin kirk . . . air ony perſones, upon pretence of fewes or takkes of manſes or glebes, hes made ſumptuous biggings fra the quhilks they think heavy to be diſpoſſeſſed d, that then the archbiſhop, biſhop, ſuperintendent ſſioner . . . travel to agree the fewer or tackſmen iiniſter or reader be delivering to the ſamin miniſ- der of ane uther manſe, quilk ſall be als gude and he uther, be juſt eſtimation the time it was ſet in kkes . . . Bot gif the fewer or takkeſman refuſes to condeſcend on the ſamin, then the execution to for removing fra the principall manſe . . . notwith- ony biggings made or to be made thereupon."

§ 2. MANSE. —1ſt CASE.

Miniſter to have the principal manſe.

Or a ſufficient houſe be built.

1572, c. 48.

Manſe neareſt to the kirk.

Or a houſe equally good.

: ſtatutes, which alſo forbid all feuing and ſetting of n long tacks, provided for the accommodation of ters of thoſe pariſhes only where there were manſes g to the parſon or vicar.

miniſters were provided to churches alſo, where —2d CASE.

[c] Mary, parl. 9. [d] James VI, parl. 3.

§ 2. MANSE —2d CASE, there were no parſons or vicars formerly; ſuch as cathed churches or abbacies [e]. In order to provide for this ſecond ca the above ſtatutes were afterwards "extended to all abbe and cathedral kirks . . . quhair na uther manſe . . . perte ing to parſon or vicar was of before: ſwa that the miniſt preſently admitted, or quhilk hereafter ſall happen to be a mitted, to the office or cure of the miniſtry within the ſa kirk, ſall have ane ſufficient manſe and dwelling place wit in the precinct of the abbey where he ſervis . . . with ſpec proviſion, that it ſall be in the option of the abbots, prio and utheris prelates, and perſones quhatſumever, fewares the ſaids cathedrall and abbaie-places, either to grant a manſe to the miniſter within the precinct of their place, elſe ane ſufficient manſe lyand als eweſt and commodious the paroche kirk [f]."

Parishes where there were no parſon's manſe.

Within the precincts of the abbey.

—3d CASE, A THIRD caſe ſtill remained unprovided for; that of t miniſters of thoſe pariſhes where there were no houſes forme ly belonging to eccleſiaſtical perſons, or where the ſame we appropriated to the uſe of an univerſity, ſchool, or hoſpital was therefore provided [g], that another houſe ſhall be deſign as a manſe to the miniſter, moſt commodious and neareſt t pariſh kirk, with relief to the heritor, out of whoſe lands t ſame is deſigned; and laſtly, on the narrative that "no withſtanding of diverſe acts of parliament made of befor diverſe miniſters are not yet ſufficiently provided wi manſes, and others do not get their manſes free at their e try [h]," the ſtatute 1663, c. 21, in order to remedy the fa of theſe evils, ordained, that "where competent manſes a not already built, the heritors of the paroch, at the ſight the biſhop of the dioceſs, or ſuch miniſters as he ſall appoi with two or three of the moſt knowing and diſcreet men

Where there was no houſe belonging to eccleſiaſtical perſons, or where the ſame was mortified to ſchools, &c.

—ST. 1663.

Narrative.

The heritors at ſight of the biſhop.

[e] Sir Geo. Mackenzie's Obſervations on James VI, parl. 3, c. 48.

[f] James VI, parl. 12, 1587, c. 118.

[g] 1644, c. 31.

[h] James VI, parl. 1, ſeſſ. 3.

the paroch, build competent manſes to their miniſters, the expences thereof not exceeding 1000l. Scots, and not being beneath 500 merks Scots [h]." §2. MANSE —3d CASE. —1663, c. 21.

In order to remedy the other inconvenience, viz. "that others do not get their manſes free at their entry," the ſame ſtatute, "where competent manſes are already built," ordained the "heritors of the paroch to relieve the miniſter and his executors of all coſts, charges, and expences, for repairing of the foreſaid manſes; declaring hereby, that the manſes being once built and repaired, and the building or repairing ſatisfied, and payed by the heritors in manner foreſaid, the ſaids manſes ſhall thereafter be upholden by the incumbent miniſters during their poſſeſſion, and by the heritors, in time of vacancy, out of the readieſt of the vacant ſtipend." —REPAIR. To be put in ſufficient repair by the heritors. But upholden by the incumbents. In time of vacancy.

This obligation upon landholders to build a manſe, is equitably held to include ſtable, barn, and byre or cowhouſe, with a garden; for all which it is uſual to allow half an acre of ground. But the miniſter cannot demand a new deſignation on the footing that the ground formerly deſigned does not amount to half an acre [i]. —STABLE, BARN, AND BYRE. GARDEN.

The act 1663 ordained the manſe to be built at the ſight of the biſhop. Since the abolition of prelacy, preſbyteries, inſtead of the biſhops, are in the practice of proportioning among the proprietors the ſums falling to be paid by each, as well as judging of the plan, dimenſions, and ſituation of the manſe. Preſbytery in place of the biſhop.

Any diſpute between the miniſter, preſbytery, and heritors or landholders, as to any of theſe particulars, or as to the Court of ſeſſion competent juriſdiction.

[h] See p. 398. [i] Erſk. B. ii, t. 10, § 57.

§ 2. MANSE.

propriety of building a new one, muſt be determined by th ſupreme court.

THE expences, according to the preſent price of labou neceſſary for the proper accommodation of the miniſter, a allowed, though far exceeding the ſtatutory ſums.

—ON WHOM.

Heritor.

Superior.

THE ſtatute 1663 lays the burden on the heritors. Thi word ſometimes means ſuperiors [k]; but here it is underſtoo to mean holders of land in property. No part of the ex pence, therefore, of building or repairing a manſe, falls on the ſuperior [l].

Liferenter.

Are life-renters liable for repairs?

THE term heritors does not include liferenters, who have been found to be free of any part of the burden of building manſes [m]: but Mr. Erſkine thinks "it is poſſible, that, in the reparation of the manſe, which has leſs of the nature of perpetuity than building it, and is frequently reiterated during the ſubſiſtence of the ſame liferent, our judges might be moved, by conſiderations of equity, to burden a liferenter, who has a real right in the lands, though it be but tempo-

k As in 1661, c. 35.

l 2d July 1778. Sir Laurence Dundas againſt Arthur Nicholſon. In this caſe, "the court, before adviſing the cauſe, ordained an inquiry to be made by the parties, whether, in the general practice over Scotland, the ſuperior was ſubjected in any parochial burdens. The court, upon adviſing certificates of the practice, with informations, were of opinion that the expence of building the manſe is to be laid on the property, and not on the ſuperiority; and that by heritors, in the ſtatute 1663, proprietors are to be underſtood: That there has been no uſage, either in the general caſe over Scotland or in Zetland, ſufficient to juſtify any contrary rule of aſſeſſment." (Fac. Coll.)

m 14th Nov. 1679. Lord and lady Binſtoun. (Stair.) *Argued* for the life renter, "whatever might be pretended in equity for making a ſtatute to burden liferenters for ſome ſhare of building manſes, yet where the matter is fixed by a ſtatute, the lieges ought to acquieſce therein, and cannot extend it *de caſu in caſum*."

§ 2. MANSE —HOW LIABLE.

ney, with the intereſt correſponding to the ſum impoſed on the ſtar for theſe repairs, while the liferent ſubſiſts [n]."

Real rent?

THE expence of building or repairing the manſe, is generally proportioned by the preſbytery among the proprietors, not according to their real rent, but according to the ſeveral valuations: and letters of horning iſſue of courſe againſt them for the payment of thoſe proportions [o].

Valued rent?

—KEEPING IN REPAIR.

ALL miniſters receiving ſufficient manſes are liable to keep them in tenantable repair; otherwiſe, they and their executors are liable in damages to their ſucceſſors in office [p].

—ENLARGING.

PRESBYTERIES, though they may authorize the reparation or rebuilding of manſes, have no power to enlarge any manſe that has been already found to be ſufficient [q]. Lands united to a church *quoad ſacra* (ſo far as reſpects religious ordinances) are not liable to repair the manſe of that pariſh to which they are annexed [r]. The vacant ſtipend is not ſubject to be applied for rebuilding the manſe [s].

Lands annexed *quoad ſacra.*

Vacant ſtipend?

A MINISTER of a royal borough was not entitled to a manſe by deſignation of the preſbytery on the act 1663 [t].

[n] Erſk. B. ii, tit. 10, § 57.

[o] Ibid.

[p] Ibid. § 58. It would ſeem that they are rather to be liable to the heritors, who muſt find a ſufficient manſe to the incoming miniſter.

The form of declaring a manſe ſufficient or free is this: The incumbent applies to the preſbytery, which appoints a viſitation of the manſe by tradeſmen, who make up and report eſtimates to the preſbytery, which, if it approves thereof, proportions the expence among the heritors. When the manſe is repaired or built, the heritors apply for a ſecond viſitation. If the viſitors report favourably, and the preſbytery approve thereof, the manſe is then declared to be *free*. In the ſame manner, a manſe may be declared ſufficient, though built not at the ſight of the preſbytery. (21ſt Feb. 1786, Heritors of the pariſh of Cairney againſt the Preſbytery of Strathbogie. Fac. Coll.)

[q] 28th July 1788, Robertſon againſt the Earl of Roſeberry. Fac. Coll.

[r] Dict. Vol. iii, tit. Manſe, p. 399.

[s] Ibid.

[t] But the court reſerved to him to

§ 2. MANSE. THE ſame thing had been decided even in the caſe of ro boroughs where the pariſh was partly landward [u]. But th caſes being attended with ſpecialties, the court of ſeſſi more lately pronounced an oppoſite deciſion [x].

§ 3. GLEBE. III. "THE glebe, is that portion of land that is aſſign to the miniſter, by ſtatute, over and above his proper fi What is it? pend [a]."

Allodial? THE glebe as well as the manſe, is rather allodial th feudal; having no expreſs holding or *reddendo*: yet "it Liferent eſcheat falls to the king. eſteemed as holden of the king in *mortification*; and ther fore the liferent of the incumbent, by being year and d at the horn, falls to the king [b]."

Benefices. Spiritualty. OF old, eccleſiaſtical benefices were held to conſiſt eith of ſpiritualties or temporalties.

Temporalty. THE ſpiritualties were the manſe and glebe, as well the ſtipend, or teinds. The temporalties, again, were other ſubjects, which had been acquired by the church property, as lands, ſuperiorities, patronages of churches, a juriſdictions pertaining thereto [c].

1ſt caſe, If there was a glebe. BY the act 1563, c. 72, there was "ſa meikle la

apply for a dwelling houſe in any other form he ſhould be adviſed. 30th June 1750, Thomſon againſt Heritors of Dunſermline, Kilk. Dict. Vol. iii. p. 398. And 16th June 1784, Rob. Mutter againſt the Earl of Selkirk; the court "reſerved to the miniſter of Kirkcudbright to inſiſt for a competent houſe rent. (Facul. Coll.)

[u] 28th Feb. 1769, Heritors of Elgin againſt Troop. 29th Jan. 17 Niſbet againſt Magiſtrates of M troſe. Scot againſt Earl of Selk Dict. V. iii, p. 398.

[x] 5th March and 21ſt May 1 Dobie miniſter of Linlithgow.

[a] Erſk. B. ii, tit. 10, § 59.

[b] Stair, B. ii, tit. 3, § 40.

[c] Hope's Minor Practice, tit § 16, and note.

nexed to the dwelling places of them that ſervis and
s at the kirk, as ſall be hereafter with gude ad-
appointed." This uncertainty, as to the quantum,
oved by the next ſtatute, by which the miniſter was
" four acres of the glebe at leaſt, lyand *contigue* or
eſt to the ſaid manſe, gif there be ſa meikle [d]."

§ 3. GLEBE. — DESIGNATION.

bove acts were extended to abbeys and cathedral
where there were no glebes, it being ordained that
ſter ſhould have " four acres of land of the beſt and
nmodious, lyand *contigue* and maiſt eweſt to the
uhilk perteines, or in ony time of before, perteined
d abbay or ony member thereof; quhidder the ſamin
within the ſaid precinct or without the ſame, gif
ſa meikle as may extend to the quantity of four

ad caſe, Where there was no glebe.
Neareſt the church.
Whether within the the precincts or not.

at order the different church lands ſhould be de-
r the glebe, was fixed by the ſtatute 1593, c. 165 [f],
; that " quhair there hes bene na glebe of auld, or
ere hes bene ſome of auld, zit it be far within the
of four aikers of land, that the deſignation be maid
rſon, viccar, abbot, or prioreſſes' lands; and failzy-
of, out of the biſhopes' lands, friers' lands, or ony
k lands lyand within the bounds of the ſaid pa-
e and quhile four acres of land be complete [g].

Order of deſignation

VI, parl. 3, 1572, c. 48, whether the glebe was ſet or otherways.
lyburton againſt Paterſon. Yet I find that biſhops' lands were deſigned before abbots' lands, becauſe that biſhops have the greater intereſt in
VI, parl. 11, 1587, c. 117.

§ 3. GLEBE. —DESIGNATION.

THERE being many churches without any arable land adjacent thereto, it was ordained that there be designed to the minister "ſerving the cure of ſik kirks where there is no arable land adjacent thereto, four ſowmes [a], for ilk aiker of the ſaids four aiker of gleib land, extending in hail to ſexteen ſowmes for the ſaids four aikers, and that of the maiſt commodious and beſt paſturage of ony kirk lands lyand next adjacent and maiſt neareſt to the ſaids kirks [b]."

Where there is no arable lands.

3d caſe, If there be no church lands.

WHERE church lands either were not within the pariſh, or were appropriated to the uſe of univerſities, ſchools, or hoſpitals, it was made lawful to deſign a glebe to the miniſter out of any other land, (or out of graſs, if there were no arable land), moſt commodious and neareſt to the pariſh kirk.

THE other proprietors of the pariſh muſt, in the order above preſcribed, contribute proportionally for a recompence to the one whoſe land is deſigned for the glebe, viz. the proprietors of church lands, when church lands are deſigned, and all the proprietors of the pariſh, where other lands are deſigned [c].

ONE exception, however, is introduced by the act 1663, c. 21 [d], "that in all deſignations of gleibs incorporate acres in village or town, where the heritor hath houſes and gardens, the ſame ſhall not be deſigned, he always giving other lands neareſt to the kirk."

heritor, whoſe lands were deſigned, becauſe there were other lands nearer to the manſe, for elſe any heritors' lands within the paroch might be deſigned out of prejudice."

[a] Paſture for a cow, or for ten ſheep.

[b] James VI, parl. 18, 1606, c. 7.

[c] 1644, c. 31. This act fell under the reſciſſory act; but it ſeems to be revived, or regarded, as ſtill in force by the act 1663, c. 21, Erſk. B. 2, t. 10, § 59.

[d] Car. II, parl. 1, ſeſſ. 3.

§ 3. GLEBE —DESIG-NATION.

as been found, that temple lands (lands which had ed to the knights templars) are not church lands in ıſe of the act of parliament, ſo as to bear a propor- arden with biſhops, parſons, and abbots lands [e].

ERE a glebe had been deſigned and poſſeſſed, the f ſeſſion refuſed to allow any new deſignation; but ing a queſtion about the quantity, ordained it to be d anew [f].

Pariſhes united.

ERE two or more churches have been united by act ament, one of them having a glebe, and another aving had any, it had been decided that the miniſter ot be excluded from a glebe in the other alſo [g]. he glebes of the conjoined pariſhes amount together

t. V. i, p. 94. The poſ- the knights were ſecular, en to them for defending e of Jeruſalem. So alſo it have been decided by the t of Paris. The preceptor der ſat in parliament *inter ni*, and not among eccleſi-

V. i, t. Glebe. "A miniſ- ng upon his deſignation to therein, and the feuer ſuſ- on this reaſon, that there lands more eweſt; and the nſwering, to fortify his de- that his predeceſſor had he lands for 20 years be- ebe; the miniſter was pre- ladd. March 7, 1610, Hen- A manſe and glebe, long y deſignation out of lands the king, and moſt eweſt, d to debar all new deſigna- icolſon, (Kirkmen) Dec. 14, 1621, Clark. A preſbytery having deſigned a new glebe to a miniſter, on pretence that the old one was barren ground, and at great diſtance from the manſe, the court of ſeſſion decided, that there could be no deſignation of a new glebe by the preſbytery, till it had firſt been cognoſced before a judge competent, whether the firſt was ſufficient; and that it was not empowered to change the glebe that had been poſſeſſed paſt memory of man, by giving a new one; but if there were inconveniences, the miniſter might purſue declarator before it, to get them amended and repaired: And therefore reduced this new deſignation of a glebe, reſerving his legal remedies as accords of the law. Forb. 24, Fount. 27 Dec. 1709, Linnen.

g Durie, Auch. (Glebe) Spott. (Kirk Patrimony), 22 Jan. 1631, Rough, Dict. V. i, t. Glebe.

§ 3. GLEBE.

to four acres, it has been ſince decided the miniſter is not entitled to any further deſignation [h].

If no church lands, Temporal lands?

WHERE there are no church lands near the church, whether temporal lands may be deſigned for the glebe, is a point not yet perfectly fixed [i].

[h] 26th Nov. 1755, Miniſter of the Goſpel at Borgue againſt John Miller, factor upon the ſequeſtrated eſtate of Carletoun. The preſent pariſh of Borgue conſiſts of what was anciently three pariſhes, viz. Borgue, Senwick, and Kerkanders; the miniſter was in poſſeſſion of the three glebes, which had anciently belonged to theſe pariſhes, each of which glebes were below the legal ſtandard, but, when taken together, were above it. On the admiſſion of a miniſter at Borgue in March 1752, the preſbytery of Kirkcudbright, finding that the glebe at Borgue was below the legal ſtandard, proceeded, according to the uſual form, to make an addition of arable ground to the old glebe. "The lords found, that the charger, being in poſſeſſion of three glebes, extending to more than a legal glebe for arable ground and graſs, was not entitled to an additional deſignation to theſe glebes, and therefore ſuſpended the letters ſimpliciter." (Facul. Coll.)

[i] In the caſe June 10, 1794, Miniſter of Kingſbarns againſt Hon. Henry Erſkine. "The pariſh of Kingſbarns was, in 1631, disjoined from the pariſh of Crail. A manſe and offices were built for the miniſter of the newly erected pariſh, but no glebe was deſigned for him.

"The preſent incumbent having applied to the preſbytery for the deſignation of a glebe, they aſſigned for this purpoſe, four acres of temporal lands lying contiguous to the manſe. There are church lands in the pariſh, but the neareſt of them are diſtant from the manſe at leaſt three quarters of a mile.

"The proprietors of the temporal lands brought a ſuſpenſion of the proceedings of the preſbytery. The lord ordinary reported the cauſe on informations.

"The court, by a narrow majority, found, that the lands allocated by the preſbytery being temporal lands, are not liable to be deſigned when there are church lands in the pariſh; and therefore ſuſtained the reaſons of ſuſpenſion of that deſignation.

"On adviſing a reclaiming petition, with anſwers, the court adhered."

But theſe interlocutors being brought under review, at the inſtance of one of the heritors, who was a minor at their date, the court altered them, and decided, "that, in the circumſtances of this caſe, the miniſter has right to have his glebe deſigned out of lands lying next to his manſe, whether they be kirk lands or temporal lands; but found, that the heritor, whoſe lands ſhall be ſo deſigned, is entitled to a proportional relief from the other heritors in the pariſh, liable in payment

§ 3. GLEBE.

ns are liable to be designed for the glebe as church What are church lands.
although the superiority only had belonged to the
for a long period before the Reformation[k]. If, at
ne of designing a glebe, there be in a parish, lands Order of designation.
f the crown in right of a priory, others held of the
in right of a bishop, and others by an university in Bishops lands.
f the priory, the first are primarily liable, the bishops'
n the second place, and the others only *ultimo loco*, Priors.
er may have been the description of the lands at the
nation, or at the date of the act 1593, c. 165[l].

Scots hitherto received in glebe." June 1799. Fac. . 127.

June 1799, the Minister of ns against David Balfour a. Fac. Coll.

rt of the parish of Crail was, erected into the new parish barns, in virtue of a decree ction by the high commis- ch declared, "That the he- the kirk lands within the blished parish of Kingsbarns, successors, shall be subject bute *pro rata* with the heri- e kirk lands within the pa- rail, sicklike, and in the same as if this division had not le."

720, the minister of Kings- plied to have a glebe and designed to him; and the y having met for that pur- heritors in 1721, by a writ- ement, obliged themselves successors to pay to the mi- d his successors 60l. Scots lieu of glebe and foggage, g to their valued rents. Fall- nging to St. Leonard's col- lege, in the university of St. Andrew's, was the only property not included in this agreement. A simi- lar payment had, it was believed, been made to the minister, though without any written obligation, from the erection of the parish.

This annual payment was continu- ed till 1790. Thereafter the presby- tery proceeded to design a glebe out of church lands. Those understood to be such were Pitmillie, nearest to the manse; Fallside, at a greater dis- tance; and Newton of Randerston, still farther removed from it.

Pitmillie had, at least as early as the 13th century, been held of the priory of St. Andrews by laymen, for the yearly feu-duty of 13s. 4d. Scots, and there was some reason to believe that it had originally belong- ed to the bishopric of St. Andrews. The revenue of the priory was an- nexed to the crown at the Reforma- tion, and it was soon after erected into a temporal lordship in favour of the duke of Lennox. It was pur- chased from him in 1635 by Charles I, who immediately presented it to the archbishopric of St. Andrews,

§ 3. GLEBE.

THE ſtatute 1594, c. 202, was ſpecially paſſed "for re lief of them quhais landis are or ſall be deſigned for manſe

and, ſince the abolition of epiſcopacy, Pitmillie has been held of the crown in right of the archbiſhop.

Fallſide was diſponed to St. Leonard's college by a prior of St. Andrew's in 1512. James IV confirmed the gift, with an immunity from all future burdens. It was ratified by an unprinted act of parliament in 1612, and no public burdens of any ſort have ſince been paid for theſe lands.

Newton of Randerſton was diſponed by the biſhop of St. Andrews to the prioreſs and convent of Haddington in 1359, and there is extant an inſtrument of ſeiſin on a feu-right to the lands, granted to a layman by the prioreſs and convent in 1461. The ſuperiority remained with the priory till the Reformation. Since that time, the lands have been held of the crown; and in ſome of the later titles, all mention of their having formerly held of the church has been omitted.

The preſbytery deſigned four acres as an arable glebe out of Newton.

The proprietor of Newton raiſed a ſuſpenſion, and the judgment of the preſbytery was at firſt ſupported only by the miniſter of the pariſh and the proprietor of Pitmillie; and the lords (17th May 1798) on adviſing informations, "repelled the reaſons of ſuſpenſion, and found the letters orderly proceeded, ſo far as concerns the four acres of glebe deſigned out of the ſuſpender's lands of Newton."

"Mr. Hay preſented a petition againſt this interlocutor, which the court directed to be anſwered by the heritors of temporal lands, and by St. Leonard's college, the proprietor of Fallſide, as well as by the other heritors.

The proprietor of Newton, beſides, contended, that from the terms of the decree of disjunction, and ſubſequent conduct of parties, the burden of affording a glebe ſhould be borne indiſcriminately by the whole heritors of the pariſh according to their valued rents.

Pleaded for the proprietor of Newton, 1*mo*, The legiſlature meant that the reformed clergy ſhould be provided with manſes and glebes from the patrimony of their popiſh predeceſſors. They cannot, therefore, affect the *dominium utile* of lands, which, like Newton, have been *bona fide* feued out to a layman above a century before the Reformation, and which, retaining no other connection with the church than the payment of a quit rent, it would have been hard to pitch on as exclaſively liable for the burden. It was only certain feus that were ineffectual againſt the claim of the miniſter; for example, where his predeceſſor had feued out his glebe, which was declared illegal by 1563, c. 72; or where the feu had been granted in view of the Reformation, after 8th March 1558, and therefore, by 1564, c. 88, ineffectual, unleſs confirmed by the crown.

2*do*, Suppoſing Newton liable to be deſigned, in terms of the act 1594, c. 165, ſtill Pitmillie, from being nearer to the manſe would be prima-

s to miniſters." It provides, "that where deſig- c. §3.
manſes and glebes beis made and tane of kirkland, GLEBE.
parochin, or an great part thereof being kirkland;
miniſter notwithſtanding deſigned to the kirkland
eſt and adjacent to the kirk:) That the ſewars,
, and tackſmen, out of quhais landes the manſes
are deſigned, ſall have their relief of the remanent

Their only connection
pric was the payment of
s annually, to the arch-
Andrews, from 1635 to
ion, while the right of
emained the ſame as it
centuries before. But,
iod of the Reformation,
to be, ſtrictly ſpeaking,
on among church lands,
l not be in the view of
re that any future diſ-
uld ariſe.
ɔſing Pitmillie to be con-
ɔiſhops lands, the glebe
deſigned from Fallſide.
priors lands, and, except
l act 1644, c. 31, there is
y for exempting lands
a college from the ordi-

for the miniſter of the
he proprietor of Pitmil-
1593, c. 165, made the
s had belonged to the
ns and vicars primarily
ıſe the reformed paroch-
ame in their place, and
t to a glebe out of their
or ſtatutes. The lands of
priors were made liable
t place, becauſe moſt of
een gratuitouſly diſponed
n in favour of laymen;
f biſhops only *ſubſidiarie*,

becauſe no grants of their property had been made by the king, as he intended to reſtore them. It is a miſtake, therefore, to ſuppoſe, that all church lands were in the ſame ſituation at the date of the ſtatute 1593, c. 165, or that the legiſlature might not have in view the future changes which might take place in them.

Anſwered for St. Leonard's college, Fallſide: Lands belonging to a college, are liable to be deſigned for a glebe only *ultimo loco*, (1644, c. 31, revived by 1663, c. 21; Stair, p. 225; Bank. Vol. ii, p. 47; Erſk. B. ii, t. 10, § 59.)

Two of the judges were much moved by the two firſt branches of the ſuſpender's argument. But the court found, 27th Nov. 1798, "that in a queſtion between the heritors of church lands, the glebe falls, in the firſt place, to be deſigned out of the lands belonging to the petitioner, being priors lands; in the ſecond place, out of the biſhops lands belonging to colonel Monypenny, (Pitmillie;) and, *ultimo loco*, out of the lands belonging to the college of St. Andrew's (Fallſide;) and therefore adhered to their interlocutor reclaimed againſt, reſerving to the petitioner ſtill to be heard upon any claim he may have againſt the other heritors of the pariſh."

§ 3. GLEBE —RELIEF.

What proprietors are liable.

parochiners, quha are fewars, poſſeſſours, and tacki kirklands, lyand within the ſaid parochin *pro rata;*" i ſays the ſtatute, "baith againſt reaſon and gude con that there ſuld be an glebe deſigned only of the ſa lands that pertains to ane fewar and poſſeſſour, an the reſt; and ſpecially quhair the hail landes within rochin, or ane great part of the ſaids lands, are alike of the kirk, and payis the like dewty." At the date ſtatute it was only church lands that were deſignable glebe. The ſtatute, therefore, ſpecified that a right obtained among the proprietors of the different churc

If a temporal land be deſigned.

But, when the ſtatute 1644 (paſſed during the uſu extended the deſignation of glebes out of temporal l equitably gave the proprietor of the deſignated lands i againſt the other temporal lands of the pariſh. If thi be now conſidered as in force, to the effect of d temporal lands, it muſt alſo be preſumed to be in for effect of giving proprietors of ſuch lands this equita of relief. But this right of recourſe is not real againſt t themſelves, it is barely perſonal, againſt thoſe who w prietors at the time of the deſignation, and their heir a glebe were deſignated out of temporal lands adjace church, while there are church lands in the pariſh, t lies wholly againſt the church lands.

—PERTINENTS.

THE act 1593, c. 165, provides, "that the g deſigned with freedom of foggage, paſturage, feu diffat, loning, free iſh and entry, and all other p and rights, according to uſe and wont of auld." act 1663, c. 21, enacts, "that every miniſter hav foggage, feal, and divots, according to the act of pa made in anno 1593."

THE import of theſe ſtatutes is, that, notwithſtan

[m] Erſk. B. ii, t. 10, § 60.

cial right thereby given to inſiſt for deſignation of a § 2.
ble, clergymen might not be deprived of ſuch ſervitudes GLEBE —PERTI-
they were previouſly in poſſeſſion of. This was neceſſary, NENTS.
prevent all miſapprehenſion of the meaning of the act.
cordingly, thoſe privileges have been allowed to miniſ-
no farther than they were ſanctioned by the particular
ge[a].

MINISTER has no right to the ſea-weeds upon the ſhore Sea-weeds.
s glebe, for the purpoſe of making kelp*, but only for
urpoſes of manure, and feeding his cattle.

eb. 28, 1769, Duff againſt
ers. The miniſters of the pa-
Cairney had, from time im-
ial, enjoyed a ſervitude of caſt-
ts in certain moſſes, the pro-
of the duke of Gordon. In
the preſbytery, upon a peti-
on Mr. Chalmers, the incum-
etting forth, that thoſe moſſes
xhauſted, deſigned part of a
looging to Mr. Duff of Drum-
for the uſe of the petitioner
ſucceſſors in all time coming.
decree being brought under
ge by Mr. Duff, it was decid-
the court of ſeſſion, that the
tery were incompetent judges,
at their decree was of *junditus*
id void. Fac. Coll.

Feb. 1779, James Dymock
William duke of Montroſe.
mock, miniſter at Aberfoyle,
t an action before the court
the duke of Montroſe, pro-
of the greater part of the pa-
ting forth, that the moſſes
which the former miniſters
ir peats were all exhauſted,
there ſtill remained extenſive
moſſes within the pariſh, and there-
fore, that it ſhould be declared, that
the purſuer, and his ſucceſſors ſerving
the cure in that pariſh, have right of
caſting, winning, and away-taking
fuel, fail, and divot, from the moſſes
ſtill unexhauſted, for the uſe of their
families.

The purſuer having likewiſe al-
leged that he and his predeceſſors had
at different times taken their peats
from different moſſes in the pariſh,
beſides the moſſes now exhauſted,
the court ordered the purſuer to give
in a ſpecial condeſcendence of theſe
alleged acts of poſſeſſion; and a con-
deſcendence being accordingly given
in, the court pronounced this judg-
ment: "Having reſumed the conſi-
deration of this cauſe, with the fore-
going condeſcendence in behalf of the
purſuer, and anſwers for the duke of
Montroſe, defender, they find the
condeſcendence not relevant; ſuſtain
the defence for the duke of Mon-
troſe; and aſſoilzie him from this
proceſs." Fac. Coll.

* 14th Nov. 1781, Lord Reay
againſt Rev. Alexander Falconer.—

§ 3. GLEBE —PERTINENTS.

A MINISTER has a right of property in the glebe. He will not be allowed to commit waſte upon it, but he is entitled to every benefit that can be derived from it *ſalva ſubſtantia*. The miniſter of a pariſh, therefore, has right to cut and appropriate trees on the glebe [p].

Trees.

Marl.

IN like manner, a miniſter is entitled to dig for marl on his glebe [q].

" Lord Reay inſiſted to have it found and declared, that Mr. Falconer, as miniſter of Edrachilles, had no right to the ſea-ware upon the ſhore of his glebe, except for the purpoſe of manuring his land, and feeding his cattle. *Pleaded*, In the deſignation of the glebe, the boundaries are diſtinctly marked, there is no mention of ſhores, nor any clauſe upon which a right to ſea-ware, as part and pertinent, can be founded. The original right, therefore, of the family of Reay ſtill continues, and muſt be ſufficient to exclude any right competent to the miniſter in virtue of the deſignation above mentioned.

Obſerved on the bench.—The deſignation of a glebe is like a bounding charter. Here the deſignation makes no mention of ſhores, and the miniſter is circumſcribed by the terms of his own right. The court, therefore, adhered to the interlocutor of the lord ordinary, who had decerned in terms of the declarator." Fac. Coll.

[p] 16th May 1799, John Logan and others againſt William Reid. The reverend William Reid, miniſter of the pariſh of New Cumnock, having propoſed to cut ſome grown trees, which had been planted by his predeceſſor on the glebe adjoining to the manſe, John Logan and ſome other heritors of the pariſh, obtain an interdict from the ſheriff against his doing ſo, till the queſtion of right ſhould be aſcertained.

An advocation of this judgment was paſſed of conſent, when, on the part of the heritors, it was averred that the trees were in full vigour that they afforded ſhelter to the manſe; and were an ornament to the country. The miniſter, on the other hand, contended, that they were growing faſt to decay, and that they rendered the manſe uncomfortable, from the damp and ſmoke occaſioned by them. But the parties afterwards waving all ſpecialties, joined iſſue on the general point, how far the miniſter of a pariſh has right to diſpoſe of trees on the glebe *qua* proprietor.

The court were at firſt a good deal divided in opinion; but they afterwards " remitted to the lord ordinary to remit to the ſheriff, with inſtructions to aſſoilzie the miniſter, and recal the interdict; and farther found him entitled to expences." See alſo a late caſe, Hepburn of Humby againſt the miniſter of that pariſh.

[q] 13th Nov. 1799, Miniſter of Madderty againſt the Heritors, Dict. V. iii, p. 251. However, in this caſe the court was much divided in opinion. It was ſimply remitted to the lord-juſtice-clerk M'Queen, ordinary

BUT a miniſter is not entitled to dig peats in the glebe[r]. § 3. GLEBE —PERTI-NENTS.

THE ſtatute 1563, c. 72, prohibited "eccleſiaſtical perſons to ſet in few or lang tacks onie of their manſes or glebes pertening to the ſaid kirks, without ſpecial licence and conſent of the queen's grace in writ[s]."

BY the ſtatute 1572, it is ſaid, "that it ſhall not be leiſom to the miniſters, or readers preſent or to cum, to ſell mallie, ſet in few or takkis, or to put ony in poſſeſſion of kirks and glebes in prejudice of their ſucceſſors, bot the ſamin to remain always free to the uſe and eaſement of ſik as ſall be admitted to ſerve and miniſter at the ſaid kirk[t]." Leaſes.

AND the act 1585, c. 11, for making all eccleſiaſtical perſons leave the benefice "als gude as they fande it," declares, that "in caſe ony of the ſaid perſons, provided to the ſaid benefices ſall happen to doe utherwayes; and be ony fewes, takkes, penſions, or changing of victual for money, or ony other diſpoſition, ſall mak their benefice in worſe eſtaite, nor the ſame was at their entrie theirto, all ſetting and diſpoſition ſall be of nane avail, force, nor effect." *Salvo ſubſtantia.*

and, on that account, is not reported in the Faculty collection. He pronounced the following interlocutor, which all parties acquieſced in:—"Finds, that the whole marl ought to be dug out, and the ſurface of the glebe then reſtored to the proper ſhape: Finds, that the whole expenſes of digging, and of afterwards putting the ſurface of the glebe in proper ſhape, and alſo the expence of this proceſs, ought to be deducted from the produce of the marl, and the free reſidue only ſecured for behoof of the incumbent: Finds, that the digging, putting the ſurface of the glebe in proper ſhape, aſcertaining and ſecuring the free reſidue, muſt be done at the ſight of the heritors of the pariſh and the preſbytery, the charger finding caution to the extent of 50l. ſterling for due implement of the above particulars, and lodging a bond of caution; therefore removes the interdict; ſuſpends the letters *ſimpliciter*."

[r] 22d Jan. 1789, Mercer againſt Miniſter of Lethendy. This caſe is not reported.

[s] Queen Mary, parl. 9.

[t] Jas. VI, parl. 3.

§ 3. GLEBE —PERTINENTS.

THESE acts have been explained into an absolute prohibition to feu, though the yearly feu duty secured by the grant to the benefice should be quadruple to what could reasonably be expected in the way of tillage[u].

THIS, however, Mr. Erskine observes, is certain, that in case of the removal of the church to another part of the parish, the old manse or glebe may be sold or exchanged for a more commodious one; and such sales or excambions have been authorised by the court. And such, it is believed, have been sustained, when fairly gone about, and not prejudicial to the benefice.

§ 4. —GRASS.

IV. IT is provided by the act 1633, c. 21[z], "that every minister (except such ministers of royal boroughs who have not right to glebes) have grass for one horse and two kine, over and above their glebe, to be designed out of kirk lands, and with relief according to the former acts of parliament standing in force. And if there be no kirk lands lying near the minister's manse, out of which the grass for one horse and

[u] 14th May 1799, the Minister of the united parishes of Little Dunkeld and Lagganallachie against the heritors. The living of Little Dunkeld and Lagganallachie has two glebes annexed to it, one at Little Dunkeld, contiguous to the manse, and consisting of six acres of arable land, and two of pasture, and the other about two miles distant, at Lagganallachie, containing about four acres, one half arable, and the other half pasture.

The yearly produce of the grounds at Little Dunkeld, cultivated in the ordinary way, could not be rated at more than 20s. per acre. But being well adapted for the establishment of a manufacturing village, the minister, with the approbation of the presbytery, feued out several acres for a yearly payment of about 6l. per acre.

Some of the heritors having considered this transaction as *ultra vires* of a parish minister, the question came to be tried in a process of suspension.

The question having been reported on informations, the court in general was of opinion, that a minister could not in any case grant feus of his glebe. The court, therefore, sustained the reasons of suspension, and suspended the letters simpliciter. A reclaiming petition was refused with answers. Fac. Coll.

[z] Cha. II, parl. 1, sess. 3.

ne may be deſigned, or otherwiſe, if the ſaid kirk lands § 4. GRASS —STATUTE.
ble land, in either of theſe caſes ordains the heritor to
the miniſter and his ſucceſſors yearly the ſum of 20l.
for the ſaid graſs for one horſe and two kine, the he-
always being relieved according to the law ſtanding,
er heritors of kirk lands in the ſaid paroch."

s proviſion of the 20l. Scots is merely ſubſidiary, to take Subſidiary.
if there be no lands in the pariſh, ſuch as are deſcribed
ſtatute; otherwiſe, neither the miniſter, nor heritors,
eſbytery, nor all of them together, have any diſcre-
r power to ſubſtitute the 20l. Scots in place of the
nds[a]. Lord Bankton[b] ſays, that this graſs being addi-
takes place though the old glebe (poſſeſſed before 1663)
include not only the four acres of arable land, but as
as might ſerve to maintain two cows and a horſe. Mr.
e does not ſpeak ſo poſitively; and an oppoſite princi-
ms to have governed two caſes[c]. But the point is
b judice[d].

h Feb. 1804, Lawrie againſt

the year 1718, the miniſ-
Newburn applied to the preſ-
for a deſignation of a graſs
nd a portion of ground was
t for that purpoſe. The in-
t did not however carry the
of the preſbytery into execu-
ut accepted the ſum of 20l.
n lieu of graſs glebe, which
at time was paid by the heri-
ording to their reſpective va-
. In 1801, the miniſter of the
made an application to the
ery for a new deſignation of
nd ground was deſigned. The
ter thereof preſented a bill of
ion of the decree of the preſ-

" The lord ordinary found the letters orderly proceeded. The court adhered."

A contrary judgment had been given in the caſe of the miniſter of Mertoun, 19th Jan. 1780. But it was obſerved from the bench, that that caſe had not been ſufficiently attended to when it was decided; that the deciſion was pronounced by refuſing a petition againſt the lord ordinary's interlocutor; and that the miniſter prematurely acquieſced. (Fac. Col.)

[b] B. ii, tit. 8, § 124.

[c] 26th Nov. 1755, miniſter of the united pariſhes of Borgue, &c. Fac. Coll. And 11th July 1801, pariſh of Kilmadock.

[d] In the lateſt caſe, a deciſion has been pronounced againſt the miniſter,

§ 4. GRASS.

Arable, meaning of.

THE act allows the graſs only to be taken out of ſuch church lands as are not arable. By arable lands is to be understood ground in a continued ſtate of cultivation, though bearing crops of graſs, and not conſtantly under the plough [c]. "Grounds may be deſigned to a miniſter for graſs, although they have been in uſe to be ploughed up for three years, and to lie three years in graſs alternately [d]."

WHETHER ground falls within the exception of arable in the ſtatute, is to be determined by its condition at the time when the deſignation is applied for, how recently ſoever it may have been brought into tillage [e]. Yet "heritors muſt

who has brought it under review by a reclaiming petition. Miniſter of Jedburgh againſt John Davidſon's truſtees, Feb. 19, 1805.

[c] Charles Grierſon againſt John Ewart, 26th June 1778. The preſbytery of Dumfries, upon the application of the miniſter of Troqueer, deſigned to him nine acres of kirk lands, for miniſter's graſs, on the ſtatute 1663, c. 21.

Grierſon brought a reduction of the preſbytery's decree on this ground: That the lands deſigned fell within the exception of the act 1663, "that if there be no kirk lands lying near the miniſter's manſe out of which the graſs may be deſigned, or otherwiſe, if the ſaid kirk lands be arable lands, in either of theſe caſes, ordain the heritors to pay the miniſter and his ſucceſſors, yearly, 20l. Scots for the ſaid graſs," pleading that the lands in queſtion being arable lands, incloſed with dike and ditch 20 years before the deſignation; and regularly producing either crops of grain, or rye graſs and clover; could not be deſigned. "The court ſuſtained the reaſons of reduction of the graſs grounds." (Fac. Col.)

[d] 27th Feb. 1756, Hodges contra Bryce.——23d June 1784. The heritors of the kirk lands in the parish of Peebles againſt William Dalgleiſh. The preſbytery allocated to the miniſtry of Peebles a piece of land formerly part of the vicar's glebe which, on the eve of the Reformation, had been feued out in ſmall diviſions to the inhabitants of the borough. The ſpot was marſhy and often covered with water for a great part of the winter ſeaſon; it had never been in tillage, nor was it frequently uſed in paſture, the graſs which grew upon it having been either cut green or made into hay. The heritors brought a reduction of the decree of the preſbytery. The court of ſeſſion aſſoilzied the defenders from the reduction. (Fac. Col.)

[e] 26th June 1778, Grierſon againſt Ewart. (Fac. Col.)

emulationem, till up that which was in uſe to be let, § 4. GRASS.
they might leave nothing for the miniſter but moſs, hills, or rocky ground, to the defrauding the good of the law, and the miniſter's manifeſt prejudice[f]."
the miniſter is generally allowed to cut the graſs e churchyard[g].

HE principal ſpirituality of benefices was the teinds § 5. TEINDS.
, which, according to Mr. Erſkine, are that "liquid on of our rents or goods which is due to churchmen orming divine ſervice, or exerciſing the other ſpiritual is proper to their ſeveral offices[a];" or, perhaps may correctly defined to be that proportion of our rents ds, which by the law is ſubjected to a perpetual inburden in favour of the miniſters of the eſtabliſhed for affording ſuch ſtipends as it ſhall appear proper competent court to aſſign.

, in truth, was the proper deſcription thereof even in imes. The canon law, indeed, ſpeaks of teinds as due hial churches of common right[b]. But this rule never

m. 1712, Miniſter of Lochuntainhall.
ec. 1778, Hay againſt Wil- Two heritors in the pariſh k brought an action before of Fife, againſt the miniſter riſh, concluding *inter alia*, ould be ordained to deſiſt uring his cattle in the rd in all time coming. The nd that he was only entit- t the graſs in the church- not to paſture his beſtial nd diſcharged him from doreafter. The defender, in dvocation, alleged, that it was the general practice over Scotland for miniſters to feed their cattle in the church-yard. The court affirmed the judgment of the ſheriff.

[a] Erſk. B. ii, tit. 10, § 10.

[b] Dec. Greg. ix, L. iii, tit. 30, c. 30, "*parochialibus eccleſiis exſolvantur, ad quas de jure communi ſpectat perceptio decimarum.*" Agreeably to this, the old ſtatute 1489, c. 7, (James IV, parl. 7,) makes it to be a point of dittay, "to intromit with the lands, teinds, obligations, profits or duties of halie kirk, without tacke or aſſedation of the perſon, vicar, or their fermorares."

§ 5. TEINDS. —HISTORY.

obtained univerſally. Here, prior to the Reformation, as in other popiſh countries, it was only in ſome that the teinds were enjoyed by parochial clergy. Th proportion belonged not merely to other churchmen, and ſecular[c], or to charitable purpoſes, as hoſpit ſchools, or to chaplanies for private devotion, or to a in cathedral or collegiate charges for maſſes to be ſ

In popiſh times.

[c] "The regulars followed the rule of St. Auguſtine, biſhop of Hippo in Africa, St. Bennet, or ſome private ſtatutes approved by the pope, and lived, ſlept, and took their diet together, under the ſame roof. They were either canons, monks, or friars, and their houſes were called abbacies, priories, or convents. The ſeculars, again, had their private rules compoſed by their chapters or borrowed from other colleges abroad, which ſtatutes were not commonly approved of by Rome. They lived ſeparately in their cloiſters, or in private houſes near to their churches, and were governed by a dean or provoſt." (Spottiſwood's App. to Hope's Minor Practics, p. 412.) So every churchman, who was not a monk, was ſecular.

The ſecular clergy conſiſted of the ſame three great claſſes, as in the epiſcopal church, viz. 1ſt, the archbiſhops and biſhops; 2dly, there were their chapters, conſiſting of the inferior orders, of the dignified clergy, as deans, arch-deans, &c.; and 3dly, there were parſons or miniſters having right to the parſonage teinds of their reſpective pariſhes, but who were not members of the biſhops chapter, and a few perpetual vicars or incumbents who were alſo ſettled for life, and were entitled to the vicarage teinds in their own the ſame manner as the par to the parſonage teinds.

The churches or pariſhe the teinds were deſtined fo per maintenance of the bi called his *menſal, patrimonial* churches. The churches whereof the teinds were d the members of the chapt inferior dignitaries of th were called *common* churche as is ſaid, the chapters live ly in common, and the their ſupport were levied a in common, and the ſa was retained when the m the chapter coming to liv ly, a ſeparation of the func took place.

When a church or ben belonged to a biſhop, or c monaſtery, none of whom the duty themſelves, the neceſſarily ſerved by vica rates, who received ſome i able allowance out of t Sometimes, however, the pa he made the donation of h to a biſhop or chapter, r himſelf the right of namin with ſuch proportion theret be neceſſary for his ſuppor ly the leſſer teinds thence

§ 5. TEINDS. HISTORY.

e ſouls of the founders; but alſo to laymen in virtue of feudations by which ſuch teinds were ſeculariſed and be- me temporal rights[d].

At the Reformation.

On the Reformation, the poſſeſſions of the popiſh hier- hy devolved on the crown and the *lords of erection*; i. e. ſe great men in whoſe favour certain parts of the church rimony were occaſionally erected into temporal baronies[e].

Third provided to miniſters.

Soon after the Reformation, the proteſtant clergy were wed a third of the church livings; for the diſtribution ereof, there were certain noblemen and miniſters of *nted* churches, appointed commiſſioners, who were called *plat*. This third was firſt ſet apart for them by an act of Plat. y council; but the object thereof having been in a great aſure diſappointed, firſt by the imperfect rentals produced the popiſh clergy, and afterwards by diſcharges granted to

These infeudations were at length hibited by councils of Lateran in 0 and 1215.

The erections, or impropria- s, being conſidered prejudicial the intereſt of the crown, the 1587, c. 29, was paſſed, where- church lands were annexed un- ably to the crown: under the ception, however, of ſuch as had viouſly been erected into tempo- al ſhips, of ſuch as has been made r to hoſpitals, ſchools, or univer- s, and of thoſe patronages which been veſted in laymen before Reformation.

his act is entitled "the annex- t of the temporality of be.efices e crown." Mackenzie, therefore, ſes it not to have included the s, "theſe being acknowledged ir law to be the patrimony of the church." (B. ii, tit. 10.) But Mr. Erſkine ſeems to think that it included the teinds alſo, becauſe it contains an expreſs exception of the teind ſheaves and the ..ale r teinds. And the act 1593, c. 1, 6. ſeems to ſuppoſe it; ſo (he might have added) does alſo the act 1592, c. 121.

f "The thirds were diſtributed among the miniſters in this ſort; 1ſt, the ſeveral kirks were planted by the ſuperintendants appointed in every province by the general aſſembly; and at the deſire of the ſuperintendants, or of the commiſſioners from the general aſſembly, the king and queen's majeſty paſſed a commiſſion under their ſeals to a numb r of the nobility and miniſters of theſe kirks whilk were planted, which meeting was called the plat." (Sir Thomas Hope's Min. Practics, tit. 2, p. 102.)

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them by queen Mary, the act 1567, c. 10, was paſſed, whereby it was ordained, "that the hail third of the hail benefices within this realm ſhall now inſtantly, and in all times to come, firſt be paid to the miniſters of the evangile and their ſucceſſors." This applied to church livings of every deſcription, menſal kirks, common kirks, patronages, and vicarages.

A third provided to the clergy.

Aſſumption of thirds.

"FOR better payment of the thirds of benefices, there were particular places deſigned for payment of the third, which was called the *aſſumption of the thirds*; and after this aſſumption, the prelates and other beneficed perſons had no power to ſet tacks, nor give penſions of that which was aſſigned for payment of the thirds[g]."

No tacks thereafter.

Common kirks made parſonages.

NOT many years after, a very material alteration took place with regard to common kirks, or thoſe belonging to the chapters or inferior dignitaries. The act 1594, c. 199, entitled, for proviſion of common kirks, "declares all common kirks to be of the ſame nature of other parſonages and vicarages, and ordains the ſame common kirks to be conferred by preſentation of the lawful patron, and ſufficient collation to miniſters ſerving thereat, ſeeing they are benefices of cure." While prelacy obtained, many of theſe common kirks belonged to one perſon, as the dean, archdean, &c. who ſerved the cure by his vicar or curate, in ſuch as he himſelf could not attend, he however remaining the *titular*, or entitled to draw the teinds. By this act, every one of the incumbents had a right to the teinds of their reſpective pariſhes, and at the ſame time, all of thoſe pariſhes were declared to be patronate[h].

Their ſtate during prelacy.

Incumbent gets right to draw the teinds.

[g] Sir T. Hope's Min. Pr. t. 2, p. 102.

[h] The biſhops' *menſal*, *patrimonial*, or *proper* churches, were not *patronate*. As the biſhop himſelf was the parſon or proper paſtor, ſo a preſentation in favour of himſelf would have been unneceſſary and improper. When the biſhop appointed another

In 1606, the eſtate of biſhops was reſtored. Although it was meant to "repone, reſtore, and reintegrate the ſaid eſtate of biſhops to their ancient and accuſtomed honour, dignities, prerogatives, privileges, livings, lands, ſtipends, teinds, rents, thirds, and eſtate, as the ſame was in the reformed kirk, maiſt ample and free at any time before the act of annexation aforeſaid;" yet, notwithſtanding thoſe terms ſo very comprehenſive, the act[y] was not underſtood to reſtore chapters, or the inferior dignitaries of the church, or to reſtore their benefices to the ſame footing in which they had originally ſtood[z]. § 5. TEINDS. Biſhops reſtored. Chapters not reſtored.

his ſtead to ſerve the cure, this is not done by *preſentation* but *collation*, the biſhop conferring or beſtowing the living upon the incumbent, with ſuch appointment out of the ſame as he choſe to give him. Neither were the biſhoprics themſelves properly *patronate*; the biſhop not having been preſented, but elected, by the chapter, though the chapter were no doubt bound to chuſe the perſon named by the king. Neither were *common* kirks *patronate*? to which the "chapter did not preſent a patron, but did nominate and collate" (Mackenzie's Obſervations, p. 84.)

It is certain, however, that many of the *common* churches were *patronate*, the patronage or right of preſentation belonging to the king, to the pope (in times of popery), to the biſhops or to laics. Thoſe livings, whether of this deſcription, or proper rectories, whereof the patronage belonged to the biſhops, were called the biſhops *patronate* churches, (the king as to them merely the *jus devolutum*), in oppoſition to his *menſal* or *patrimonial* churches, whereof the benefice belonged to him *plene jure*.

[y] 1606, c. 2.

[z] The act, indeed, reſcinds all acts that had the effect to diſmember particular kirks, or common kirks of the ſaid biſhoprics, from the ſamen; but the meaning of this was no other than again to annex to the biſhopric what had been originally within the dioceſe, i. e. to ſubject thoſe pariſhes to the eccleſiaſtical diſcipline of the biſhop. And, accordingly, from that time forward, the biſhops had their chapters, but this was only nominally, i. e. the parſons or miniſters of certain pariſhes were called the dean, archdean, &c. aſſiſted the biſhop in all matters of diſcipline, and concurred with him in ſuch acts reſpecting his own benefice, as could not be done effectually without the conſent of a chapter. But this had no effect upon the benefices of the chapter or inferior dignitaries. It did not, for example, reſtore the dean to all the churches which formerly belonged to the deanery. It did not entitle him to draw the teinds of thoſe pariſhes; ſerving the cure by a

§ 5. TEINDS —HISTORY.

IT was at the diſtance of eleven years after, viz. by t 1617, c. 2, that chapters or inferior dignitaries of the c were reſtored to their former rights and privileges. I however, with the exception of ſuch teinds and patr as had been lawfully granted by the king. Such, the as had been thus granted, remained parſonages in vi the act 1594, and of laic patronage, in virtue of the grant, and of this exception.

Chapters reſtored.

Important alteration in the condition of tithes.

UPON this footing ſtood matters till the reign of C I, to whom we are indebted for a very important alt in the condition of this ſpecies of property, which principally diſtinguiſhes the Scottiſh teind from the I and Iriſh tithe, freeing it from thoſe inconveniences rendered it formerly a fruitful ſource of diſquietude a preſſion.

Old mode of drawing, *ipſa corpora.*

HITHERTO the church beneficiaries, and other t had been in the practice of making their right to the effectual, by drawing the teind, or, in other words, by ating the tenth of the produce, after the corn was and by carrying it off the ground. This drawing teinds was attended with grievous hardſhips to the p tor of the ground and his tenants; for every poſſeſſor who carried off any part of his corn from the field, titular had drawn his teind, was, from the firſt ef ment of the church's right, ſubjected to ſevere pe and the titular, ſometimes from indolence, but m quently with a view of compelling the proprietor, at price, to purchaſe the leading of his teinds, delay drawing thereof till great part of the crop was r

Grievous.

ſtipendiary, under the name either of vicar or of curate. The pariſhes remained as under the act 1594. They ſtill remained parſonages and vicarages, each incumbent havin the teinds of the pariſh ſerved the cure.

[a] Erſk. B. ii, t. 10, § 24.

ivers ſtatutes had been paſſed[b], without affording an te remedy to the evil.

§ 5. TEINDS --HISTORY.

RLES I executed a general revocation, and thereafter ons, of all impropriations that had been granted by his

Charles I revocation.

To avoid the iſſue of a trial, the defenders agreed nit the matter to the king himſelf, who pronounced reral decrees arbitral, reſpectively applicable to the caſes of the ſubmitting parties. The firſt ſubmiſſion be the lords of erections, titulars, tackſmen, &c. heritors of lands, to his majeſty, anent their ſuperiand teinds," &c. The ſecond was "be the biſhops rgie of Scotland, to his majeſty, anent the rights of The third was "be the burrowes, to his majeſty, their teinds." The fourth was "be certain tackſnd others having right to teinds," &c. Upon each h ſubmiſſions his majeſty pronounced a ſeparate debitral[c].

Submiſſion.

firſt and fourth ſubmiſſions were ſigned, on the one r the lords of erection, and the tackſmen claiming them; and, on the other, by the landholders, who l either to purchaſe their own teinds, or to have alued[d]; ſubmitting "all and ſundry teinds that they

First ſubmiſſion.

5, c. 8; 1612, c. 5; 1617,

the ſmall acts, V. ii, p. 87.

nference between the king titulars upon the ſubject of , his majeſty inſiſted, 1ſt, proprietors ſhould be relievthe hardſhip of having their rawn by the titulars. 2d, the ſuperiorities of erection, nds holden of the titulars, g in place of the monaſterld be declared to be in the crown, on a reaſonable compoſition to be paid to the titulars for paſſing from their right. 3d, That a ſmall intereſt ſhould be reſerved to the crown out of all erected teinds. The ſubmiſſion took place on the baſis of theſe demands.

d Theſe ſubmiſſions contained procuratories of reſignation by the titulars, for ſurrendering their right of ſuperiority to the king *ad remanentiam*, (on which account they were called alſo the ſurrenders of teinds);

§ 5. TEINDS —HISTORY.

or any of them have of other men's lands, by w right or title they poſſeſs or occupy the ſame; ſu likewiſe to his majeſty, how they may be denude in his majeſty's favour, *omni habili modo quo de jure* ; in like manner, ſubmit to his majeſty to appoint the thereof, and what price ſhall be given thereof for t and what ſecurities ſhall be made thereanent, th always freed and relieved of the burden of min *ratæ*."

Terms of firſt ſubmiſſion.

Second ſubmiſſion.

THE ſecond ſubmiſſion, viz. that ſigned by th and clergy, did not include the teinds which t themſelves, but thoſe only which they had let in t proprietors.

By whom.

Its terms.

Third ſubmiſſion.

THE third, viz. that by the royal boroughs, was right they could claim to the teinds which had bee for the ſuſtentation of miniſters, colleges, ſchools, als, within their reſpective boroughs[e].

Valuation.

THE moſt important article in theſe decrees that which directs the valuation of the teinds at

referring to his majeſty what conſideration ſhould be given to them for the feu-duties, or other conſtant rent of theſe ſuperiorities.

e "The king, by the decrees arbitral, declared his own right to the ſuperiorities of erection, which had been reſigned to him by the ſubmiſſion, reſerving to the titulars the feu-duties thereof, until payment by himſelf to them of one thouſand merks Scots for every chalder of feu-victual, ratified 1633, c. 14; which right of redeeming the feu-duties was renounced by the crown, 1707, c. 11. If the church vaſſal ſhould conſent to hold his lands of the cannot thereafter recur t as his immediate ſuperior

"His majeſty referred eſt the crown ought to h teinds of erected bened commiſſioners, who de annuity to be paid out of crown, of about ſix per 1633, c. 15. This right been annexed, was conv Livingſton in ſecurity of in 1674, the exerciſe of pended by the crown; time it has lain dorma 13."

yearly rate, after which the landholder is entitled to the whole crop, upon payment of that yearly duty to the titular. § 5. TEINDS —HISTORY.

THE rules which the commiſſioners appointed for that purpoſe are directed to obſerve in the valuation, are different according to the different condition of the teinds. His majeſty "finds and declares, that the rate and quantity of all teinds of the kingdom is and ſhall be the fifth part of the conſtant rent which each land payeth in ſtock and teind, where the ſame are valued jointly. And where the teinds are valued apart and ſeverally, findeth that the rate and quantity thereof is and ſhall be ſuch as the ſame ſhall be valued and eſteemed to by the ſaid commiſſioners, or ſub-commiſſioners, deducing always the fifth part thereof, which we, out of our fatherly and royal care for the well of our ſaid kingdom, ordain to be deduced off the ſaid teinds, ſeverally valued as ſaid is, for the eaſe and comfort of our ſubjects." Rules various in the different caſes.

THIS regulated the valuation and ſale of teinds in every different predicament in which they could ſtand, 1*mo*, If they are let to the landholder for a certain duty, whether in money or in kind, ſuch teinds are poſſeſſed by the ſame perſon who poſſeſſes the ſtock. The teinds, in this caſe, not being ſeparated from the ſtock, cannot be ſeparately valued. In the decree arbitral, ſuch teinds are ſaid to be valued with the ſtock. And the rule laid down is, inſtead of the tenth of the increaſe, to take one-fifth of the rent, payable for both ſtock and teind. 1st CASE.

2*dly*, If the teinds be yearly drawn by the titular himſelf, and thus actually ſeparated from the ſtock, it is eaſy to value them ſeparately. In the decrees arbitral ſuch teinds are ſaid to be ſeparately valued. From the average value, however, of the teinds, which appear to have been annually drawn, 2d CASE. King's caſe.

§ 5. TEINDS —HISTORY.

there falls in this caſe to be deducted one-fifth, which is called the king's eaſe; ſo that under the decree arbitral in valuing ſuch teinds, it is taken at four-fifths of its actual amount[f].

3d CASE.

3*dly*, IF the teinds of certain lands have been drawn *corpora* by the titular, and mixed ſo with the teinds of other lands as not to admit a proof of the real quantity or actual value, the rule for aſcertaining the value of theſe lands in a proceſs of valuation at the inſtance of the proprietors of the lands is, that the lands be valued at the ſame rate as where joint duty is paid for ſtock and teind, that is, that the teinds be valued at the fourth part of the rent paid to the purſuer for the ſtock; this amounting to the ſame with the fifth part of the rent, where that rent is paid both for ſtock and teind.

—SALE OF TEINDS.

THE firſt decree arbitral, viz. that applicable to the remiſſion of the titulars, contains alſo the following proviſion touching the ſale of teinds: "And as to the price of teinds, we find the price of each hundred merk of teinds, conſiſting in money, to be valued and eſtimate to nine years purchaſe. And where the ſaid teinds conſiſt in victual, or other bodies of goods, becauſe there is great difference of the quality of victual, and of other bodies of teinds, both in ſpecies and kinds, and in worth and goodneſs, according to the diverſity of places in the country where the ſame grows and are, therefore we decern and ordain trial to be taken by commiſſioners appointed, or to be appointed by us, of the price, worth, and eſtimation of each chalder of victual, and of all other bodies of goods, wherein the teinds conſiſt, of kinds and goodneſs, as the ſame commonly ruleth in each part of the country."

[f] Erſk. B. ii, t. 10. Jan. 28, 1708, Doul. Feb. 7, 1711, Hume.

[g] 22d Feb. 1744, Sir Robert Gordon againſt Dunbar of Newton Kaimes, No. 54. Dict. V. iv,

r teinds may ſtand in two different predicaments. Ei- § 5. TEINDS —HISTORY —SALE.
e ſeller poſſeſſes them under an heritable right or not.
s that is or is not the caſe, the price paid for them
ly falls to be different.

CHING the firſt caſe, the decree arbitral was as fol- If the ſeller had an heritable right.
'We find the juſt and reaſonable price thereof to be
: to nine years purchaſe; and we declare this nine
urchaſe to be the juſt price of the heritable right of
where the ſeller hath the heritable right thereof."
ng the other caſe, where the right was not heritable,
ſiſted in tacks, or ſuch other temporary rights, his
declared "the price in this caſe to be ruled propor- If he had not.
r, according to the number of years in the tacks to
id quality of the rights." And it referred "to the
ſioners appointed, or to be appointed, to determine
down the proportion of the price of teinds, accord-
he years of the tack to run, and quality of the rights
; in the perſons of the ſaid heritors, and according
uality of the rights ſtanding in the perſons of thoſe
d title to the ſaid teinds, after the outrunning of the
tacks and rights of the ſame [h]."

eably to the condition of ſſion, it was "declared, that eritors who ſhall buy their ls, ſhall be obliged to pay re of the ſame, but ſuch as by and attour the miniſter's nd other pious uſes which, nour of the general com- re ordained to be firſt pro- nd alſo that thoſe who ſhall heir own teinds, and are to in payment of the rate of ls above ſpecified, ſhall be obliged in payment there- of to the ſaid titulars, but what deduction of ſuch part and portion thereof as is reſting by and attour the ſaid miniſters ſtipends and pious uſes forſaid."

The ſtat. 1633, c. 17 and 19, deprived landholders of the power of compelling a ſale, unleſs it was proſecuted within two years after obtaining a valuation. But this condition is not underſtood to be in force, not being repeated in ſubſequent ſtatutes. Irving, May 14, 1794. (Fac. Coll.)

§ 5. TEINDS —HISTORY —SALE.

Fourth submiſſion, as to ſale of teinds.

SIMILAR clauſes were inſerted in the decree arbitral, re lative to the fourth ſubmiſſion; but not in the ſecond c third ſubmiſſions; for the teinds belonging to churchmer and thoſe granted to certain boroughs for public and pio uſes, were deſtined to continue as a perpetual fund for th maintenance of the clergy, or for thoſe uſes to which the were appropriated, which are inconſiſtent with their bein ſold. It only directed how theſe teinds ſhould be value and ſecured the proprietors of the land in the full enjoy ment thereof, on payment of the yearly duty [i]. Wit ſuitable powers for carrying theſe decrees arbitral into effect a parliamentary commiſſion was appointed [k], and particu larly authorized "to proſecute and follow furth the valua tion of whatſoever teinds, parſonage or vicarage, within th kingdom, which are as yet unvalued. And alſo to receiv the reports from the ſub-commiſſioners, appointed within ilk preſbytery, of the valuation of whatſoever teinds, led an deduced before them, according to the tenor of the ſub commiſſions direct, to that effect. And to allow or diſallow the ſame, according as the ſame ſhall be found agreeable o diſagreeable from the tenor of their ſub-commiſſions. And

Commiſſioners appointed.

[i] The only teinds, therefore, belonging to churchmen, which fell under the ſubmiſſion, and which the king had a power of valuing, were thoſe which were in tack, or other uſe of payment, and of which the beneficed perſons were not then in poſſeſſion, by rental bolls or drawn tithe. Accordingly his majeſty confined the award, proceeding on the ſubmiſſion by the clergy, to the ſpecial teinds falling within the compaſs of it, the rate of which he declared to be the ſame as of thoſe belonging to titulars.

[k] 1633, c. 19. It was granted to nine of the clergy, nine of the nobility, nine of the ſmall barons, and nin of the burgeſſes; together with m lord chancellor, and eight officers o ſtate... or any 15 of them, there be ing three of every eſtate, with thre of his majeſty's officers of ſtate; o which number of 15 the lords chan cellor, theſaurer, and privie ſeal, and biſhop of St. Andrews or Glaſgo earl marſhall, and earl of Wintou or any of them, ſhall be one to me and conveen at Holyrudehouſe Edinburgh, at ſuch times and pla as they ſhall think fit.

ith power to rectify whatſoever valuations, led or to § 5.
, to the enorme prejudice of the titulars, and to the TEINDS —HISTORY
d detriment of the kirk, and prejudice of the miniſ- —SALE.
intenance and proviſions, or of his majeſty's annuity.
r the better expeding and advancing of the ſaids va-
, with power to appoint committees, or ſub-commit-
heir own number, to receive the reports of the ſaids
s made or to be made; and to receive, admit, and
witneſſes, and to take parties oaths, with their de-
, where the ſame is referred to oath; and to give
her power to the ſaids committees or ſub-commit-
eir own number, as they ſhall think fit for the good
ork, and ſpeedy finiſhing of the ſame. And ſick-
power to them, if need be, to appoint ſub-com-
s, not being of their own number, within any pa-
preſbytery of the country, for leading and deduc-
e ſaids valuations, and to receive the reports thereof,
diſallow of the ſame: And generally with power to
ſet down whatſoever other order or courſe which
hought fit and expedient for diſpatch of the ſaids
s, rectifying thereof, or final cloſing of the ſame.
like, with power to the ſaids commiſſioners, or any
f them, as ſaid is, there being three of ilk eſtate,
one of the perſons of the quorum above ſpecified,
cloſing and allowance of the valuations of ilk kirk,
nt, modify, and ſet down a conſtant and local
nd maintenance to ilk miniſter, to be paid out of
s of ilk parochin, according to the tenor of the acts
:cified. Referring, like as his majeſty refers, with
of the ſaids eſtates, to the ſaids commiſſioners, the
the reaſons and cauſes which may move the ſaid
ners to go beneath the quantity of eight chalder of
r of eight hundred merks of money proportionally,
er contained in the ſaid act. And ſicklike, with
the ſaids commiſſioners to divide ample and ſpa-

§ 5. TEINDS —SALE.

cious parochins, where the ſame ſhall be found neceſſary a expedient, or to unite divers kirks in whole or in part others. And to ratify and allow, after trial and conſide tion, ſuch union or diſmembering of parochins, as hath be formerly made by virtue of the former commiſſions. A ſicklike, with power to them to appoint and provide for ſu other pious uſes in each parochin, as the eſtate thereof m bear."

Teind court.

THE court of ſeſſion ſucceeded to the power of the commiſſioners. Queen Anne's act "anent plantation kirks and valuation of teinds" having appointed the lords council and ſeſſion "to judge, cognoſce, and determine in affairs and cauſes whatſoever, which by the laws and act parliament of this kingdom were formerly referred to, a did pertain and belong to the juriſdiction and cognizance the commiſſioners formerly appointed for that effect, as fu and freely in all reſpects as the ſaid lords do or may do other civil cauſes; and particularly, but prejudice to t generality foreſaid, to determine in all valuations and ſa of teinds, to grant augmentations of miniſters ſtipends, p rogations of tacks of teinds, to disjoin too large pariſhes, erect and build new churches, to annex and diſmemb churches as they ſhall think fit, conform to the rules l down, and powers granted, by the 19th act of the parl ment 1633, the 23d and 30th acts of the parliament 16 and the 24th act of the parliament 1693, in ſo far as ſame ſtand unrepealed."

SINCE this period, no further alteration has been made ſtatute on this branch of the law.

—DIVISION.

IN Scotland, profits made by perſonal induſtry, "as trading, negociation, artifice, ſcience," &c.[a], were n

[a] Stair, B. ii, t. 8, § 5.

able. Our law always reject perſonal teinds; with us are only predial, that is, ariſe from the "fruits of nd or water [b]." Teinds are either parſonage (rectorial), h, as the greater, were drawn by the parſon; or vicarage, rial), which, as the ſmaller, were drawn by the vicar [c]. TEINDS —DIVISION Perſonal teinds rejected by the Scottiſh law.

RSONAGE means the teind of corn, as of wheat, barley, peaſe, called *decimæ rectoriæ gabales* [d]. Vicarages that ery thing elſe. —PARSONAGE.

RN is titheable by the public law, independently of n or preſcription; and cannot therefore be diſcharged this burden by diſuſe of payment for what period ſo- The arrears, however, are *debita fructuum*, not *fundi*; ing no real burden or charge on the lands, nor afford- ny claim againſt ſingular ſucceſſors, but againſt the r perſons merely who have intromitted therewith, or ſt thoſe who repreſent them [e]. Neither the arable Not dependent on cuſtom. No immunity from diſuſe of payment.

nd Stair calls predial the *natur-* s of ground or water; and to *brial* fruits of the ground only es the name of mixed. Mr. e, however, obſerves, that the : of animals, which anſwers to ſcription of *mixed* tithes given ſt authors, (Stair and Macken- truly predial, as it is paid t deduction of any charges t in rearing it, and as it be- to the church of the pariſh the paſture lands lie, and not : in which the proprietor re- (B. ii, t. 10, § 10). Mr. Erſ- herefore, defines predial "as g from the produce of lands, r merely natural, or in part ial." (Ibid).

the perſon ſerving the cure of of which he was not parſon, was appointed by the lay patron, thus holding his place for life, and drawing the ſmall tithes by the ſame right that the parſon drew the greater, he was called vicar. If, on the other hand, the biſhop or other clergyman, in right of the benefice, appointed him to ſerve, during his pleaſure, for ſome ſtipulated ſtipend, he was called a curate. (Lord Bankton, B. ii, t. 8, § 140.)

[d] Erſk. B. ii, t. 10, § 13.

[e] Erſk. B. ii, t. 10, § 42. The lords found, that bygone teinds muſt be accounted for at the higheſt fiars, and not at the commiſſary or ſecond fiars. Edgar, 28th February 1724, Kirk Seſſion of North Leith againſt Law. "In a proceſs, at the titular's inſtance, for the teinds of bygone years, who claimed a fifth part of

§ 5. TEINDS —PARSONAGE —EXEMPTIONS.

glebe, nor the *foums* or proportion of graſs, (ſubſtituted ſtead thereof where there is no arable ground[c]), nor lan held *cum decimis incluſis*, are titheable.

Lands *cum decimis incluſis.*

LANDS held *cum decimis incluſis*, or (as the Engliſh lawye expreſs the ſame thing) *with unity of poſſeſſion*[f], are ſuch as n ver were tithed; belonging originally to churchmen who, whe they poſſeſſed the lands themſelves, gathered the whole frui indiſcriminately; and, when they conveyed the property t others, included, in one charter, ſtock as well as teind, whic thus never were ſeparated[g]. But if the charter ſpecified ſeparate *reddendo* for the teinds, the lands have not the ſam exemption. Such teinds are not conſidered as *decimæ incluſæ* although they ſhould be ſo deſcribed in the charter[h].

the rent which the lands were worth for the reſpective years, and inſiſted, that, without regard to the rent payable by the tenant to the heritor, who, on account of graſſums or extraordinary ſervices, might accept of leſs than the lands were worth, he might be allowed a proof of the true value of the lands by their ſowing and holding, the lords found, that the fifth part of the rental muſt be the rule. Kilkerran, 22d June 1738, Sinclair againſt Groat." *V.* Teinds, No. 2.

A titular having brought an action in order to have his right to his teinds aſcertained, and having claimed arrears for 40 years back, it was decided in the court of ſeſſion, that a colourable title of poſſeſſion, ſuch as a ſeries of diſcharges from the miniſter, in full of the ſtipend or teind, was a ſufficient defence againſt payment of the arrears, though, in terms of the declarator, decree was pronounced for the payment of the tein claimed in future. 25th Feb. 17 Sir John Scott againſt Heritors Ancrum. Fac. Coll.

[c] 1578, c. 62; and 1621, c. 10.

[f] Woodeſon's Viner. Lectures, ii, p. 103; Black. V. ii, p. 31.

[g] Erſk. B. ii, t. 10, § 16.

[h] "In a proceſs of augmentation, was urged, that Menzies of Pitfo dles ought to bear his proportio becauſe his teinds, though deſigne in his charter *decimæ incluſæ*, yet wer ſeparate from the ſtock, as the cha ter bore a ſeparate *reddendo*, payabl for theſe teinds, viz. eight bolls victual, and *de facto* they bore a pa of the miniſter's old ſtipend. T lords found they were not the tr kind of *decimæ incluſæ*, and therefo found the heritor liable." Fountai hall. 12th July 1678.

Miſs Scott was proprietrix of c tain lands which had belonged to

§ 5. TEINDS —PARSONAGE.

LANDS may be held *cum decimis inclusis*, as to the parſonage teinds, and yet be liable in payment of the vicarage teinds. The latter may not have belonged to the churchman who feued out the lands, but may have been drawn by the vicar.

Decimæ inclusæ.

Temple lands.

LANDS which formerly belonged to the privileged orders, as the knights templars, ciſtertians, hoſpitallers, are titheable[i].

—VICARAGE.

ALL other teinds, beſides thoſe of corn, are called with us vicarage[k]. Vicarage uſually conſiſts of the teinds of

abbey of Lindores. In all the charters of theſe lands the teinds were comprehended, and uniformly termed *decimæ garbales incluſæ*. Different duties, however, for ſtock and teind, were contained in thoſe charters, and paid by the vaſſals. In a proceſs of augmentation, Miſs Scott claimed an immunity from payment of ſtipend for theſe lands, as being held by her *cum decimis incluſis*. "But the lords, conſidering that lands granted *cum decimis incluſis* are ſuch as had never been ſubject to the exaction of teind, or in which there had never exiſted a ſeparation of ſtock and teind, whereas here there was an actual ſeparation, and a diſtinct payment of duties, repelled the claim of immunity." 17th July 1782, Heritors of Colleſſie againſt Miſs Scott; and Nov. 21, 1798, Colville.

[i] June 15, 1737, Miniſter of Barry, Dict. V. ii, p. 438.

[a] In a proceſs of augmentation, a defence was made by one of the heritors, that his lands were teind free, in reſpect they did antiently belong to the abbay of Balmerino, a convent of the Ciſtertian order; and, in the year 1539, were feued out to the defender's authors by the abbot and convent, *cum decimis garbalibus earundem*; that the Ciſtertians were one of the four privileged orders by the law of Scotland, whoſe lands were teind-free, and that the defender, as deriving right from them, while this privilege ſubſiſted, was intitled to the ſame privilege; and for this Lord Stair was appealed to, lib. 4, tit. 24, § 9, and ſir George Mackenzie, B. 2, tit. 10, § 7. Anſwered, 1mo, The Ciſtertians had no privilege as to their teinds, except as to lands acquired before 1120, the date of pope Innocent the third's canon, which excludes the privilege of the four orders as to *acquirendo*, and, though this will exclude the privilege entirely with regard to Scotland, where the Ciſtertian order had no property for a century thereafter, it only ſhows the inaccuracy of our writers, who, in laying down the doctrine in general, have not adverted, that it would not apply to Scotland. The lords repelled the defence founded on the charter produced for the defender."

[k] Bank. B. ii, t. 8, § 140.

§ 5. TEINDS —VICARAGE.

animals, as calves, lambs, or their produce, as wool, milk, cheese, eggs; which, however, without cuſtomary payment are no more titheable than flax, plants, roots, or other product of gardens; all vicarage depending wholly upon uſage.

1 March 9, 1796, Rev. John Hunter againſt duke of Roxburgh.

"Part of the ſtipend of the pariſh of Oxnam aroſe from certain vicarage tithes due out of the lands of Plenderleath and Hyndhopes, belonging to the duke of Roxburgh. Theſe tithes, ſince 1686, had been uniformly let, by the incumbent for the time, to his grace's predeceſſors, for 106l. 13s. 4d. Scots of yearly rent, and a graſſum of 1000l. Scots at the commencement of each leaſe.

The leaſes were always made to endure for the lifetime of the granter, and three years longer; and the ſubject let was deſcribed to be, 'All and ſundry the vicarage tithes, fruits, emoluments, and duties, of all and haill the ſaid duke of Roxburgh his lands and barony of Plenderleath,' &c.

The miniſter, on the expiration of the leaſe current at his admiſſion, brought an action of declarator againſt the duke of Roxburgh, in which he contended, that he was entitled to the *ipſa corpora* of the vicarage teinds of all the articles raiſed upon the lands from which vicarage is payable. At all events, he muſt be entitled to the tithe of lambs, ſtirks, and wool, which are included under the moſt limited ſpecies of them. Erſk. B. ii, t. 10, § 13; Dict. V. ii, p. 438; 24th July 1678, Grant againſt Mackintoſh. But the late lord-juſtice-clerk M'Queen denied that there was any foundation in the law of Scotland for the ſuppoſed diſtinction between theſe lambs and other vicarage teinds. He knew of no rule but uſage to fix what ſubjects were liable to vicarage teind. Where money was paid for any length of time, the legal preſumption was, that ſuch money rent was the value of the teind.

The court of ſeſſion, 20th Nov. 1795, found, 'That the purſuer, a miniſter of the pariſh of Oxnam, is titular of the vicarage teinds in queſtion; but in reſpect he has not condeſcended upon, or offered to prove what vicarage teinds were in uſe to be drawn by his predeceſſors, found That, in *hoc ſtatu*, his demand falls to be reſtricted to the ſum of 106l. 13s. 4d. Scots of tack-duty yearly, and 1000l. Scots of graſſums, in uſe to be paid at the admiſſion of each incumbent.'

The duke of Roxburgh, in a ſupplementary petition, ſtated, That, by inveterate practice, he and his predeceſſors, on paying the 1000l. Scots graſſum, were entitled to a leaſe of the teinds *during the life of the incumbent, and three years longer*; but that, by the preſent judgment, he was made liable for the graſſum at each *admiſſion* of each incumbent. He therefore prayed, that the interlocutor might be ſo far altered, explained, as to find that he was entitled to a leaſe on the uſual terms.

The court pronounced the following interlocutor: 'Find, That, upon

ch ſo, indeed, that though it is not very eaſy to draw e between one ſort of hay and another, yet it has been l, that the right of the miniſter to tithe bog or natural ll not entitle him to tithe hay from ſown graſs, al- bog-hay ſhould no longer grow in the pariſh[m]. § 5. TEINDS —VICARAGE. Natural hay.

ere happen to be no fruits to tithe, the titular has no igainſt the proprietor, who is entitled to turn arable into graſs, ſubſtitute ſown graſs for natural hay, and ly to manage his ground in the manner moſt agree- beneficial to himſelf[n]. If no fruits. Proprietors power of manage- ment.

curity of the teinds, the titular has a right of hypo- er the fruits, but not on the horſes, oxen, ploughs, plements of huſbandry bought on the ground, or on ier *invecta et illata*. If one buy, though at a public e crop on the ground, either before it be reaped, or : lies in the fields, he is liable in payment of the teind. ingly, the buyer of titheable fiſh, new caught, was ned to pay the teind[o]. But where corns are bought blic market, it has been ſuſtained as a good plea in of the buyer, that he did not know that the teind been already drawn[p]. Hypothec. Over what?

DS, properly ſpeaking, are not a burden upon land- . For as the lands belonged to the proprietors, ſo ds belonged to the church. The rights of the two Right of teinds how conſtituted.

of the fine or graſſum of ts, the petitioner and his are entitled to a leaſe of the tithes in queſtion during the incumbent at the time, and years thereafter; and, with nation, adhere to the inter- claimed againſt.'

e 15, 1796, Brown againſt Hunter. (Fac. Coll.; and Sup. to Dict. t. 1, Teind.)

[n] Erſk. B. ii, t. 10, § 43.

[o] Erſk. B. ii, t. 10, § 44; Stair, June 24, 1662; Vernor, and Dec. 13, 1664, Biſh. of Iſles.

[p] Erſk. ibid. 20th Dec. 1664. Reid. Stair.

§ 5. TEINDS If by ſeiſin.

were conſtituted differently. The lands paſſed by ſeiſin; t the right of teinds veſted in churchmen as a neceſſary c ſequence of their ſeveral eccleſiaſtical offices, without t intervention of any form of law. Such is the caſe with r niſters ſince the Reformation: and a right to teinds at t day, even in favour of laymen, when it is conferred by ſtatu as on patrons by act 1690, c. 23, is complete without ſeiſi

Seiſin when neceſſary.

AFTER the Reformation, indeed, when entire church be fices were erected into temporal lordſhips, ſuch impropr tions, teind as well as ſtock, became proper feudal ſubje and the charters of erection feudal grants. The titles of grantees were completed by ſaſine, and ſuch teinds then forward were conveyable only in a regular feudal manner infeftment [a].

Aſtriction of.

THE aſtriction of lands which are held *cum decimis inclu* implies a thirlage of the teind as well as the ſtock, the la holder being proprietor of both. But the aſtriction by a p prietor, while as yet he has no right to the teinds, can extend to the teinds, though he ſhould afterwards acq right thereto; becauſe he cannot be preſumed in mal the acquiſition to mean to render the burden heavier aga himſelf.

—VALUATION.

HAVING conſidered the hiſtory and general nature teinds, it may be now proper to attend to the practical r which have been eſtabliſhed for the following out thoſe viſions, as to their valuation and ſale.

Purſuer who?

THE landholder is the ordinary purſuer of the valuati but it may be competently ſued for by the parochial mi

Land-holder?

ter, in order to the fixing of his ſtipend; and the decre

Miniſter?

valuation obtained by him is the rule for eſtabliſhing valuation of the teinds therein mentioned between the t

[p] Erſk. B. ii, t. 10, § 40. [a] Ibid.

lar and the heritors [b]. For it was the deſign of the legiſlature to force valuations by all reaſonable means; and to this end, this burden was laid upon miniſters, under the certification that they ſhould not have otherwiſe acceſs to a modification; and the act 30 parl. 1641, ſhews this to have been the caſe, in which act the commiſſioners are empowered to modify after cloſing the valuation, "or at leaſt exact diligence of the miniſter to that effect [c]." For the ſame reaſon, the landholder, when he brings the proceſs of valuation, is allowed the privilege of drawing his own teinds, unleſs he ſuffer proteſtation to be extracted by the titular againſt him for not inſiſting in the action [d]. It may alſo be ſued out by the procurator fiſcal on account of his majeſty's intereſt; that is, in ſhort it may be ſued out by any perſon intereſted in its objects, which were, 1ſt, that the proprietors of lands ſhould have the leading of their own teinds, and ſhould not be farther liable to the titular, or thoſe having intereſt beyond the juſt value thereof, as the ſame ſhould be aſcertained by the decree of valuation; 2dly, that a fixed and conſtant ſtipend ſhould be modified and localled to the miniſter out of theſe teinds, after the valuations were completed, to fix the extent of the teinds; and 3dly, in order to aſcertain the extent of the king's annuity.

§ 5. TEINDS —VALUATION.

Objects of a valuation.

In actions of valuations, it is neceſſary to call the titular or his tackſman, and the miniſter of the pariſh, or, in caſe of a vacancy, the moderator of the preſbytery, they having an intereſt that the teinds be not valued too low; the titular as the perſon to whom the valued teind is payable [e], and the

Who called.

[b] C. Home and Remark. Deciſ. 12th Dec. 1744, duke of Roxburgh againſt Scot, Supp. to the Dict. *voce* Teinds.

[c] Lord Elchies *apud* Kames, ibid.

[d] 1693, c. 23.

[e] It was decided that it was no ſufficient objection to the approbation of a valuation of the ſub-commiſſioners, that the crown being titular, the crown officers had not been called as defenders in the proceſs before the

§ 5. FINDS VALUATION.

miniſter as having no other fund for future augmentations [f].

BUT, in actions for approving of the reports of ſub-commiſſioners, it is preſumed that all parties having intereſt were in the field, thoſe reports in general proceeding on proof, and ſeldom ſtating the procedure particularly, but merely the reſult [g].

ſub-commiſſioners. 20th July 1763, Thomſon of Ingliſton againſt Officers of ſtate and earl of Galloway.

[f] A proceſs was brought for approbation of a report of the ſub-commiſſioners, valuing the teinds of Nether Arrochar. It bore, that the heritor, patron, and miniſter, had, in preſence of the ſub-commiſſioners, conſented that the old rental of the teinds ſhould be held as their value in all time coming. The miniſter, purſuing an augmentation, objected, that the conſent of the incumbent at the time could bind his ſucceſſors. The court approved of the report. 4th Feb. 1795, Ferguſſon againſt Gilleſpie, Dict. *voce* Teinds.

Concerning the teinds of Upper Arrochar, the report bore, that the heritor and patron had given a ſimilar conſent, but did not mention that the miniſter had concurred. The court refuſed to approve of the latter report. Ibid.

Both deciſions were affirmed on appeal.

[g] 7th March 1798, Sir William Erſkine againſt the reverend David Balfour. An action was brought by ſome proprietors of the pariſhes of Torryburn and Crombie, for approving of the report of the ſub-commiſſioners, valuing their teinds in M The valuation appeared to have ta place at the inſtance of the procu tor fiſcal, who was preſent. The port proceeded on a regular pr In ſeveral paſſages it was mentio that the titular was preſent, and the heritors were either preſen cited. But this did not appear w regard to the miniſter; and, the o ſion being objected to, the court pelled the objection.

It did not enter into view, in ciding this caſe, that the action at the inſtance of the procurator cal. It was not his duty and buſi to attend to the intereſt of the ſev miniſters in the preſbytery. The curator fiſcal was in the ſame wa the procurator fiſcals in the other ferior courts in the kingdom, as ſheriff court, &c. to attend to the tereſts of the public or of the cro Beſides the intereſt of the crown many pariſhes, as patron and tit the crown had an intereſt in ev one valuation, on account of the ki annuity; ſo that it was impoſſible proceedings could go on with eſ without having a proper officer pointed to attend to the crown's tereſt. This officer was the procur fiſcal, who appears as the purſue

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IT is ſufficient, in ſuing for a valuation, to call the titular or patron, or thoſe having a patrimonial intereſt in the teinds, and the miniſter of the pariſh. The contingent intereſt of the other proprietors, that the valuation ſhould be fairly conducted, neither makes it neceſſary to call them, nor entitles them to ſiſt themſelves as parties; nor are they entitled to object to the valuation, on the footing of the miniſter or of the titular not having been called, nor to bring a reduction thereof on ſuch grounds [h].

Who may object to a valuation.

BUT objections to a report may be competently ſtated by the common agent in a locality, as acting for the titular and patron, as well as for the heritors [i].

What is valued?

IN fixing the conſtant yearly rent in a valuation of teinds, ſiſt, no rent is taken into account which is not paid for the *titheable* fruits of the land. Such part of the rent, therefore, or yearly revenue, as ariſes from an orchard, the fruits whereof make no part either of parſonage or vicarage [k]; or from ſtone quarries, clay for making brick or earthen ware [l], or

many valuations, and is in ſome of the reports deſigned procurator of the preſbytery.

So alſo the caſe, 3d June 1801, Smith againſt Macqueen.

[h] June 1799, John Francis Erſkine of Marr againſt Sir Ralph Abercrombie.

[i] 30th Nov. 1803, Hamilton againſt Colebrooke. In this caſe, a report of ſub-commiſſioners in 1631, and approved of in 1770, was oppoſed by the common agent in the locality of Drummelzier on the head of dereliction. The title of the common agent to maintain this objection was queſtioned, on the authority of the caſe of Erſkine of Marr, that as none of the heritors individually had either title or intereſt to object to a decree of approbation, ſo the common agent could not ſtate, in his own name, a plea which would not be competent to any of his conſtituents. The court held the anſwer to be ſufficient, that the titular was intereſted and entitled to object, and that the common agent who acted for all concerned, the titular and patron as well as heritors, was entitled to plead in their right, and therefore to object.

[k] 2d March 1757, Hay of Lawfield againſt the duke of Roxburgh. Fac. Coll.

[l] Erſk. B. ii, tit. 10, § 32.

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from a moſs, all which are *partes fundi*, rather than fruits or from ſupernumerary houſes built for the purpoſe of a manufacture unconnected with the farm; or "from houſes ov and above what are neceſſary for the farm [n];" or from mills

[m] 11th Dec. 1734, heritors of Calder, Dict. Vol. ii, *voce* Teinds.—— 22d July 1772, Fullerton againſt the New College of Aberdeen. In this caſe, the court ſuſtained the following deductions: "viz. of the rent of the miln-eye of the over miln of Kinnaber; the waulk miln, ſnuff mill, and ferry boats, on the north water of Eſk, and houſes, yard, and ſmiddy, poſſeſſed by David Scott, ſmith; and alſo of ſervices and kains paid in kind; and likewiſe the butter, in reſpect the quantity is ſo ſmall, being half a ſtone."

[n] Erſk. B. ii, tit. 10, § 32. In like manner, in England, "houſes for habitation, and the rents reſerved on them, or on land, are not titheable. But houſes in London are titheable by virtue of an arbitration or decree confirmed by parliament. In other places alſo, an annual payment may be due to the incumbent in reſpect of houſes, if it hath the ſupport of cuſtom." (Woodeſon Vin. Lect. V. ii, p. 92.)

However, it has been decided in the court of ſeſſion, that no deduction is to be given for *extra* houſes poſſeſſed by the farmer. Earl of Selkirk againſt the Officers of State, 8th Dec. 1802. *Pleaded*, "if the tenant, deſirous of better accommodation than uſual, agrees with the landlord to give a houſe beyond the ſtyle of what the farm uſually has, not to allow a proportional deduction for the additional rent, would be making a dwelling houſe a teindable ſubject." *Anſwered*, "if the houſes are neceſſary for the commodation of the tenant, no allo ance can be given for them: on t other hand, if they be erected not the purpoſes of agriculture, but indulge the whim or vanity of t tenant, no deduction can be claime the titular's intereſt cannot be hurt ſuch unneceſſary accommodation The court refuſed to admit the deduction claimed on account of *extra* houſes. It may be doubt however, whether the argument ed for the titular be not fallacio The titular's intereſt, it was ſa ought not to be hurt by ſuch un ceſſary accommodations But this begging the queſtion. If the tena pays additional rent for the gratifi tion of his vanity, the titular does suffer by allowing a deduction of ſu additional rent. If no ſuch deducti be allowed, the titular is tithing ſubject not titheable.

[o] In a valuation, deduction is allowed of additional rent paid account of exemption from multur 8th Feb. 1786, Earl of Kintore agai the united college of St. Andrew In a proceſs of valuation of tein brought by the earl of Kintore agai the college of St. Andrews, he clai ed a deduction from his rental of part of the rent, as being paid by t tenants in conſideration of his relie ing them from a multure of the f teenth peck, the knaveſhip on which was the thirty-third peck, ing exacted for the labour of gri

proprietor undertaking any burden which the on the tenant, as for example, of keeping the in repair [q]; or from that increaſe of the rental by the tenants relieving the landlord of the payceſs, that being a variable and uncertain burden [r], nto the computation.

he name of kains, or flying cuſtoms, a reaſonable allowed. But if what truly ought to make part ible fund be diſguiſed under any other name than the fraud will be corrected [s].

r, If the landlord has raiſed the rent by any unpenditure, as by draining a lake, he is allowed a batement [t], though the drained grounds ſhould e truly worth the rent that the proprietor had in his leaſe to the tenant [u]. It has been found gained from the ſea are not titheable [x]. And here the proprietor had improved or raiſed his dditional rent, if it had commenced within ſeven bringing the action of valuation, was not rec-

Uncommon expenditure.

Drained lands.

Recovered from the ſea.

Rent raiſed within 7 years.

e additional land rent ubſtitute for the mill rt, after adviſing med the deduction. The brought under review l enſwers. The court ring in preſence, and red their former interpelled the claim of de. Coll.)

, tit. 10, § 32.

nverted prices of fowls, wedders, lambs, &c. dlord has reſerved an to demand the ſubconverſion, are conſidered not as kain, but rent, and therefore titheable. (Erſk. B. ii, tit. 10, § 32.)

t Kilkerran, No. 2, *voce* Teinds, 18th July 1739, heritors of Calder.

u Erſk. B. ii, tit. 9, § 32.

x 21ſt Feb. 1759, magiſtrates of Inverneſs againſt the heritors. Pleaded for the town, This improvement not only had been made and was kept up at great expence, but was in daily hazard of being totally undone by the ſea breaking through the bank; and therefore the 183l. 12s. now paid to the town, could not be ſaid to be a *conſtant* and *certain* rent which is requiſite. (Fac. Coll.)

§ 5. TEINDS VALUATION.

koned in the computation of rent by the older practice, probably from the uncertainty, whether the lands would continue able to bear that addition; but by the later deciſions, ſuch part of it is accounted rent, as the commiſſioners of tithes, from the circumſtances of the caſe, judge equitable [y].

Culture.

BUT the expence of culture, though heavier than ordinary if it be annual, ought not to be deducted from the rent. No deduction is therefore to be allowed on the account of manure though the tenant ſhould purchaſe it at a high price from the inhabitants of a neighbouring village; and far leſs on account of ſea-weeds [z], which generally are procured without much trouble or expence.

Peats.

HOWEVER, where the proprietor proved that he was obliged, without any price, to furniſh his tenants with marle for the uſe of their lands, and that the increaſed rent, on account of that ſtipulation, would be moderately eſtimated at 20 per cent, the court allowed the deduction to that extent [a]. But it has been decided that a proprietor is not entitled to a deduction from his rental on account of peats or turf for fuel allowed by him to his tenants [b]; nor on account of expence incurred in laying on lime [c].

WHERE the lands are in the natural poſſeſſion of the pro-

[y] 1ſt Feb. 1738, Erſk. B. ii, tit. 10, § 32.

[z] Erſk. Ibid.

[a] 23d Feb. 1785, Gordon *contra* Officers of State, Dict. Vol. iv, p. 355.

[b] 14th Dec. 1796.

[c] Earl of Selkirk againſt Officers of State, 8th Dec. 1802. Fac. Coll.

A deduction was claimed on account not only of building houſes, but of improvements, by making fences and drains and laying on lime. The deduction was allowed for the improvements of fencing and draining, but rejected as to the building and liming. On adviſing a reclaiming petition, the court allowed 5 per cent. on the expences laid out on ſhells, and marle, to be deducted from the rental in valuing the teinds. But this interlocutor being brought under review by the officers of ſtate, was altered. The court returned to their original interlocutor, allowing no deduction but for fencing and draining,

§ 5. TEINDS —VALUATION.

or, the teind is "a fifth part of the rent which they are worth, and might have been paid had they been rented enant; and when they are actually let, it is a fifth of nt which they now pay, and may pay in all time com- consideration of the fruits[d]."

—TACIT RELOCATION.

einds be let to the landholder for a fixed number of years; at the expiration thereof the titular declare not his ion to resume possession of the lease, it is presum- be renewed, or the possession continues by *tacit re-*. The method by which the titular must express tention of removing the lessee, is by an *inhibition of* a writ issuing either from the signet or the commissary at the suit of the person entitled to take possession of inds, and discharging all others from intermeddling rith. This writ is executed edictally and entitles the to an action either for declaring his right to a fifth of nt, or for a warrant to draw the teinds themselves.

Inhibition of teinds.

he lessee continue to possess after the inhibition, he is to account for the whole of the teinds drawn by whereas, if without inhibition, the titular brings an against him for payment of a sum as the yearly va- the teinds, it has been found that the citation does terrupt the tacit relocation, and that the defender is for the full teinds only from the date of the final in- utor[e].

Citation, its effects.

§ 6. STIPEND.

We have already seen the successive provisions made e reformed clergy down to the appointment of the of session as commissioners for plantation of kirks and ion of teinds. This court has the power of *modifying*

[d] B. ii, tit. 10, § 32. [e] Nov. 1765, earl of March Leismans. Fac. Coll. Sir John Scott against Mrs. Stewart, 25th Feb. 1795. Ibid.

§ 6. STIPEND. —MODIFICATION.

and *localling* miniſters ſtipends, that is fixing the *quantum* each ſtipend, and the proprietors by whom it is payable.

In ancient times.

By chapter 10th of the Scottiſh provincial councils [f], the penſion payable to the vicar or pariſh prieſt was to be no lower than ten merks [g]. In the arrangement of the ſtipends in the year 1582, 400l. Scots [h] each was fixed as the yearly ſtipend in one hundred pariſhes; 200l. do. in another claſs of one thouſand pariſhes; and 66l. 13s. 4d. in the remaining one hundred pariſhes. In the year 1588, the firſt miniſter of Edinburgh's yearly ſalary was only 400l. Scots; the ſecond miniſter's, 333l. 6s. 8d. Scots; the third miniſter's, 200l. Scots; and the fourth miniſter's, only 40l. Scots. By the commiſſion 1617, it was declared that the ſtipend provided to any miniſter ſhould not be under five chalders of victual, (that is, eighty bolls of grain), or 500 merks of money [i] or proportionally part victual and part thereof in money, ac-

[f] Hailes' Annals, Vol. iii, Append. No. 2; and Wilkin's Concilia Britannica.

[g] This regulation, lord Hailes obſerves, ſeems to have been carried into effect. Ibid.

[h] 33l. 6s. 8d. ſterling.

[i] 27l. 15s. 6⅓d. ſterling. The rate at which victual is here valued is 100 merks Scots, or 5l. 11s. 1⅓d. ſterling per chalder, or 4l. 3s. 4d. Scots, (6s. 11⅓d. ſterling), per boll. Afterwards it came to be valued at 100l. Scots, (8l. 6s. 8d. ſterling), the chalder, or 6l. 5s. Scots, = 10s. 5d. ſterling the boll of victual, i. e. part meal and part bear. The ſtatutory converſion applied to all grain indiſcriminately. But, in the teind court, wheat is valued a third higher, viz. 128l. Scots, = 10l. 13s. 4d. ſterling the chalder, or 8l. Scots, = 13s. 4d. ſterling the boll. At the date of the ſtatutes, the 100 merks, and afterwards 100l. Scots, were probably the real price of the grain. Hence it is, that even yet in the teind court, victual of every kind is always reckoned worth its real price; and, of courſe, the ſtipend is to be modified in money or victual, not with any view of making it higher or lower, but from a view of the circumſtances of the pariſh, as affording more or leſs plentiful produce in kind; and a victual ſtipend has this advantage, that it is leſs fluctuating in its value. The old converſion does neither good nor to miniſters, being quite nominal but to thoſe proprietors whoſe teind have been valued in money, at the low rate, it has given an advantage which cannot be undone.

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cording as the fruits and rents of the kirk ſhould afford, or as the commiſſioners ſhould think expedient. The parliamentary commiſſion in 1627, "after reaſoning upon the loweſt proportion and proviſion, wherewith the miniſtry ſerving the cure at each kirk ſhall be provided, thought it meet and expedient that the loweſt proportion" ſhould "be eight chalders victual where victual is paid, or, proportionally in ſilver victual, as the commiſſioners ſhould appoint." Theſe eight chalders of victual or 800 merks were to be the loweſt ſuſtenance, "except ſuch particular kirks occur, wherein there ſhall be a juſt, reaſonable, and expedient cauſe to go beneath it." This commiſſion was ratified by the act 1633, c. 8; and neither the laſt nor any ſubſequent commiſſion having taken any notice of the *maximum* ſpecified by the commiſſion 1617, the teind court does not think itſelf limited thereby; but wherever there is a ſufficiency of free teinds, exerciſes a diſcretionary power of augmenting the ſtipend to ſuch ſum as the weight, or burdenſome nature, or expenſive ſituation, of the charge, may ſeem to require.

Minimum.

Teind court, its diſcretionary powers.

THE former commiſſions being to private individuals, were, of courſe, temporary. Their powers, however, were at length more properly devolved into the hands of a court of permanent juriſdiction. Yet, as the inſtruction was "to appoint conſtant and local ſtipends," this court, for ſome time, held, that in regard to any pariſh, its commiſſion was exhauſted by a ſingle augmentation of the ſtipend; and, therefore, in two caſes, refuſed to grant ſecond augmentations[b]: But theſe judgments were reverſed by the houſe of lords. By augmenting the ſtipend of any pariſh, the teind court, therefore, no longer thinks itſelf precluded from judg-

Can the teind court modify more than once?

[b] Milligan againſt the heritors of Culden, 4th Aug. 1779, Fac. Coll.; reverſed 8th July 1784.——Mitchel againſt heritors of Tingwall, 23d Dec. 1786; reverſed 22d May 1789.

§ 6. STIPEND —MODIFICATION.

ing of ſubſequent applications, and granting other augmentations if circumſtances ſeem to require it.

If the teinds be valued in money, can grain be modified?

THE teind court, according to its diſcretion, may modify ſtipend in money or in victual, or partly in both.

Teinds valued in money.

SOMETIMES, however, part of the teinds, at other times all of them, are valued in money. This would naturally happen wherever the rents, at the time of the valuation, were payable in money. Sometimes, even where the rent was partly payable in victual, the teind has been valued in money. In order to do juſtice to the miniſter, and maintain equality among the proprietors, victual ſtipend may be localled even on thoſe whoſe teinds are valued in money[j].

Even where rent was money.

IN ſuch caſes, however, the value of the money muſt be computed at a *medium* of the fiar prices for the county, which have been ſtruck for the laſt ſeven years preceding the interlocutor of augmentation[k].

Stock not to be encroached on.

IN no caſe whatever can the ſtock be encroached upon. Therefore, inſtead of delivering and paying the quantity of victual and money ſtipend laid upon any proprietor, it is optional to him to give up, and pay in all time thereafter, to the miniſter, the whole of his valued teind, according as the ſame ſhall have been aſcertained by his decree of valuation[l].

BUT the miniſter's right to the ſtipend, modified to him by the interlocutor of the court, cannot be impaired or altered by the circumſtance of any one taking this option. His

[j] 24th Jan. 1798, miniſter of Lamington againſt lord Douglas and dame E. Lockhart, Fac. Coll.

[k] Ibid. Skene and the miniſter of Skene, 31ſt Jan. 1798.——Earl of Mansfield againſt miniſter of Gutmertrees, 31ſt Jan. 1798.

[l] Ibid.

proportion of victual-ſtipend muſt be laid upon the other proprietors [m]. § 6. STIPEND —MODIFICATION.

THE word *victual*, is a ſort of technical expreſſion in the teind court, importing oat-meal and bear; but not underſtood to include wheat. A *victual* ſtipend, however, or valuation in *victual*, naturally ſignifies one in grain or corn, in oppoſition to money; beſides wheat, thus including, of one *genus*, barley, bear, or bigg; of another, white oats, black oats, grey oats, and grey horſe corn. Victual, meaning of.

THE court, as already obſerved, may give victual or grain when the ſtipend is valued in money. But it has not yet aſſumed the power of obliging any one, whoſe teinds are valued in victual, to pay to the miniſter another ſort of grain than that mentioned in the decree of valuation, or at leaſt without making ſuch a diminution in the quantity as might correſpond to the ſuperiority of the quality [o]. A doubt has been ſtarted touching the meaning of the term *bear*, Bear.

[m] Nov. 16, 1803, Dalglieſh againſt the heritors of Peebles. Fac. Coll.

[o] In 1634, the teinds of Kinneder were valued at one chalder or ſixteen bolls of grey horſe corn, which is the worſt ſpecies of oats. In December 1794, the court modified the miniſters ſtipend to be "ſixteen bolls grey horſe corn *inter alia*, being the whole ſtipend of the pariſh." Theſe ſixteen bolls were localled on the lands of Kinneder. The ordinary growth of the pariſh at the date of the valuation was grey horſe corn; but at the date of the augmentation was white oats. The proprietor of Kinneder, however, ſowed ſome grey horſe corn, and offered ſixteen bolls thereof to the miniſter, who refuſed it as unmarketable, and inſiſted for ſixteen bolls of white oats, as the ordinary growth of the pariſh. A ſample of the grey horſe corn was produced in court. It was thought that the miniſter, on the one hand, was not obliged to take it; and that the proprietor, on the other, was not obliged to deliver the full quantity in white oats. On the motion of the late lord-juſtice-clerk Macqueen, it was decided that the miniſter ſhould have ſo many bolls of white oats as ſhould correſpond to ſixteen bolls of grey horſe corn, agreeably to a pecuniary valuation that had been put on the different kinds of grain in the pariſh recently after the teinds were valued. Forſar, miniſter of Saline, againſt Oliphant, June 1796.

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which occurs in ſo many old decrees of valuation; and w ther under that denomination, as the general term *hordeu* the miniſter be entitled to the long-eared barley, (now ge erally called *barley*), where that is the uſual crop of the p riſh, or only to the ſquare or rough barley, in England call bigg, has, it is believed, not yet been finally decided; unl in ſo far as it has been determined by the court of ſeſſio that an heritor is not entitled to ſow an inferior ſort of gra merely for the purpoſe of furniſhing it to the miniſter [a].

Barley.

As already obſerved, it could never be ſaid, without ma exceptions, that *decimæ debentur parochiæ*. However, t parochial miniſter is always entitled to a competent provi from the teinds of the pariſh, into whoſe hands ſoever th may have come; even ſhould they, paſt all memory, ha been appropriated as part of the ſtipend of the miniſter ſome other pariſh [b].

[a] 7th March 1805, Brig-gen. Al. Graham againſt Rev. Mr. Bell, miniſter of Crail.

[b] Dr. Johnſton, miniſter of North Leith, againſt the heritors of St. Cuthberts, 3d May. 1802. About the beginning of the ſeventeenth century, the pariſh of North Leith was disjoined, by act of parliament, from the pariſh of Holyroodhouſe; and in the year 1636, the lands of Millhouſefield and Newhaven were united and annexed, by the commiſſioners of teinds, to the new pariſh of North Leith. The teinds of theſe lands, however, ſtill continued as before to be paid to the miniſter of St. Cuthberts. In 1797, the miniſter of North Leith raiſed a proceſs of augmentation, calling the heritors of St. Cuthberts, and contending he was entitled to have a modification out of thoſe teinds, without which there could not be a ſuitable proviſion. *Pleaded for the heritors*, the uſe of payment, proceeding u regular decrees of court, afford ſufficient title to acquire by the p tive preſcription. *Anſwered*, preſcri tion applies not. A miniſter, till need ſuch teinds for an augmenta of his own ſtipend, has no intereſt oppoſe the miſapplication, and is *valens agere*. The court found, " in allocating the purſuer's ſtipe as modified, after continuing the ſtipend drawn by him conform to and wont, and after exhauſting a other free teind in his pariſh, t purſuer is entitled to all, or as mu of the victual preſently paid out the teinds of Newhaven to the mi ter of St. Cuthberts, as may be n ceſſary for completing his ſaid mo fied ſtipend." The miniſters of Cuthberts made no oppoſition, the being plenty of teinds in their o pariſh for their proviſion.

Sometimes the teinds of one pari

ER *modifying*, the next thing is to *local* the ſtipend; § 6. STIPEND —LOCAL-ITY.
ſettle the different proportions thereof payable by the
landholders. Till a decree of locality be obtained,
iſter may require payment of his whole ſtipend from
: of them, if it exceed not the amount of his teinds,
him to recur for his indemnification againſt the

e firſt place, free teinds are allocated; that is, thoſe Rules of allocation,
ave neither been let nor ſold to the landholder: but 1ſt, Free teinds.
emain ſtill with the crown, or have been veſted in
ron by virtue of the acts 1690, c. 23, and 1693, What are they?
or have been conveyed by the crown to a lay titular.

: to be paid as part of the
f another pariſh, not from
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ſemouth againſt heritors of
4th Feb. 1756, Fac. Col.
act 1690, took away the
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declared that the right of
of the ſaid pariſhes, which
eritably diſponed, ſhall, by
this preſent act, belong to
trons, with the burden al-
ways of the miniſters ſtipends, tacks,
and prorogations already granted of
ſaid teinds, and of ſuch augmentations
of ſtipends, future prorogations and
erections of new kirks, as ſhall be
found juſt and expedient, providing
the ſaids patrons getting right to the
teinds by virtue of this preſent act,
and who had no right thereto before,
ſhall be, like as they are hereby oblig-
ed to ſell to each heritor the teinds
of his own lands, at the rate of ſix
years purchaſe, as the ſame ſhall be
valued by a commiſſion of valuation
of teinds."

This ſtatute was paſſed immediate-
ly on the abolition of prelacy. On
this account, poſſibly, it would ſeem
that ſome doubt had been entertain-
ed, whether it extended to *parſonages*
and perpetual *vicarages*, which, except
as to diſcipline under the biſhops,
within whoſe dioceſes they were ſit-
uated, had no proper connection with
prelacy. Therefore, by the act 1693,
c. 25, it was expreſsly declared, "that
the foreſaid right of teinds, granted

§ 6. STIPEND —LOCALITY.

It is only in case of there not being a sufficiency of f teinds in either of the two first predicaments, that those possession of the lay titular are allocated.

If the teinds be let.

IF the titular draw not the teinds himself, but have them to the landholder, it is only the yearly rent or ta duty paid to the titular that is considered as free tei Sometimes land is feued out for payment of an annual duty, both for stock and teind. In that case, such pro tion thereof as may appear to be payable for the teind allocated [c]. If any teinds have, in the manner above m tioned, been payable as part of the stipend of any o minister, such teinds are to be allocated next after the o free teinds [d].

Duty for stock and teind.

AFTER the free teinds there fall also to be allocated teinds as the titular feuing the land chose to reserve [a].

to patrons, as said is, shall be extended to the teinds of all parsonages and other benefices, and that the same shall belong to the patrons with the burdens specified in the said act."

[c] 13th Feb. 1797, Sir Thomas Dundas against Robert Baickie. The lord ordinary found, "in respect it is admitted that part of the duties paid by the heritors of St. Andrews and Deerness to Sir Thomas Dundas, are teind duties, finds that these teind duties are first to be allocated on with the other free teinds of the parish." The court adhered by two consecutive judgments. A similar judgment was pronounced in a case between Mr. Graham of Kinross and his vassals, and in subsequent cases.

[d] This order was observed in the case of North Leith, mentioned above. The interlocutor was, "find that after exhausting any other free tei his parish, the pursuer is entitl all or as much of the victual pr ly paid out of the teinds of New to the minister of St. Cuthber may be necessary for completin modified stipend."

[a] 2d July 1746, Muir of Cal against Heritors of the Parish of lop. Rem. Dec. V. ii. The i locutor was; Find "that the t of the lands feued out are to be sidered as if no such feus had granted; and therefore, that cannot be allocated to the mi while there are any free teinds i parish." Lord Kames says, this was much struggled, and that Elchies in particular was of opi that these teinds were to be con ed as the teinds of other mens in the hands of the granter o

§ 6. STIPEND—LOCALITY.

THE reaſon of the rule of allocating to the miniſter, *primo loco*, free teinds, or thoſe in the poſſeſſion of another than the proprietor of the land, is the inclination of our law to give every landholder, as far as poſſible, the poſſeſſion of his own teinds. And the ſame principle runs through the whole rules, as to the order of allocating other teinds: Thus, Reaſon of the rule.

TEINDS let in leaſe to the landholder are allocated in the ſecond place [b]. 2d, Teinds in leaſe.

IN the third place, if the miniſter cannot be competently provided otherwiſe, even thoſe teinds to which, by purchaſe under the act 1693, or otherwiſe, the landholder has acquired any heritable or feudal right, may be allocated [c], but not unleſs proportionably with the teinds of the lands belonging to the titular himſelf. The allocation of his purchaſed teinds affords the landholder no recourſe againſt the titular, to whom he paid the ſtatutory price, but who is not underſtood to warrant them againſt future augmentations, which are a known burden by law on all teinds, and which were in view in ſelling them ſo cheap. However, if the titular either has expreſsly warranted them againſt future augmentations, or got a price large enough for preſuming ſuch warranty, his own teinds will be allocated firſt [d]. 3d, Do. ſold.

ſt; and he put the caſe, what if a man ſhould feu both ſtock and teind, and afterward purchaſe back the teind? It is clear, at leaſt, that the circumſtance of the titular not being compellable, by act 1690, to ſell ſuch teinds, decides not the caſe; becauſe, as to the titular not being compellable to ſell the teinds, the ſtatute ſuppoſes an implied pactum between him and the feuars, which, it is evident, can have no influence in the queſtion of allocation. With lord Elchies, ſome eminent judges concur in thinking that deciſion bad.

[b] As a compenſation to the tackſman for this ſupervening burden, the commiſſioners are empowered, by the act 1690, c. 30, to prorogate the leaſe for ſuch term of years as appears juſt. The tackſman is not entitled to ſuch prorogation, unleſs the augmentation be granted by judicial authority. (Erſk. B. ii, t. 10, § 52.)

[c] Dec. 21, 1757, Edmonſtone of Dunbeath againſt duke of Montroſe.

[d] Erſk. B. ii, t. 10, § 52.

§ 6. STIPEND —LOCALITY.

TEINDS, though purchaſed during the dependence of proceſs of locality, have been found entitled to the ſame privilege as thoſe purchaſed previouſly [e].

4th, Colleges.

THE teinds belonging to colleges are allocated in the fourth place [f]. But ſuch teinds partaking of the nature of a gift for a pious uſe, cannot be allocated till thoſe derived from a lay titular are exhauſted.

Teinds purchaſed during the dependence of the locality.

[e] 7th June 1797, Dr. Lamont againſt Heritors of Urr. In 1794 the miniſter obtained an augmentation, to commence with crop 1795. In May 1795 Dr. Lamont obtained a proof, in a proceſs of valuation of his teinds. In July 1795 the lord ordinary approved of a locality, whereby Dr. Lamont's teinds, as free, were firſt allocated. In November, the titular, having no property in the pariſh himſelf, nor, of courſe, any intereſt to counteract Dr. Lamont's object, granted him a voluntary conveyance of his teinds, which was produced on the locality. The lord ordinary, not thinking this late purchaſe entitled thoſe teinds to any privilege, adhered to his interlocutor. But the court altered it, and found Dr. Lamont had "produced a ſufficient heritable right to the teinds of his lands within the pariſh, to entitle him to be localled upon only *pari paſſu* with other heritors having heritable rights. *Obſerved by the court*, The object of Dr. Lamont's action was merely to bring him in *pari paſſu* with the heritors having right to their lands. The titular has no intereſt in this caſe, and the heritors have no proper title to complain. But in the caſe where the heritor had obtained a decree of valuation, and was in courſe of obtaining decree of ſale, the court refuſed to ſtop procedure till he had obtained a decree of ſale. May 1800, duke of Queenſberry againſt earl of Mansfield. Had he obtained his decree of ſale before the decree of locality, how far the principle *pendente lite nihil innovandum* would have applied in favour of the titular, intereſted as one of the heritors alſo, to prevent the preference, has not been decided.

[f] 12th Dec. 1716, Miniſter of Old Machar againſt the college of Aberdeen; 1753, Miniſter of Marytown againſt the new college of St. Andrews; 16th May 1792, Miniſter of Marytown againſt the college of Aberdeen, not collected; and Dec. 9, 1795, Heritors of Portmoak againſt Mrs. Douglas. Fac. Coll. The interlocutor found, that ſhe "could not, in right of the college, plead an exemption, if there were not other teinds in the pariſh upon which the ſtipend could be localled; but found, that there are, in this caſe, lay titulars and teinds upon whom the ſtipend can be localled, the teinds belonging to the college of St. Andrews are, by law, entitled to an exemption."

§ 6. STIPEND —LOCALITY.

In the laſt place, if the other teinds prove inſufficient for the competent proviſion of the parochial miniſter, even biſhops teinds themſelves have no exemption [g].

In two pariſhes united *quoad omnia*, Are there ſeparate localities?

In localling an augmented ſtipend, two pariſhes, though they have been long united *quoad omnia*, are yet not conſidered as one pariſh. The modified ſtipend is divided between them, in proportion to their proven rentals; but there are ſeparate localities, each patron having right to allocate his proportion thereof only within his own pariſh [h]. But part of a pariſh annexed to another *quoad ſacra* only, and continuing to pay ſtipend to the miniſter of the pariſh from which it was disjoined, is not liable in payment of any ſtipend to the miniſter of the pariſh to which it is annexed [i].

If a ſecond miniſter be not eſtabliſhed by the authority of the teind court, but by private agreement with the heritors and magiſtrates of boroughs, he is not entitled to an augmentation out of the teinds [k]. But, in one caſe, where

[g] June 3, 1795, Skene againſt Officers of ſtate. Dict. V. iv, t. Teinds. But teinds formerly belonging to the arch-dean, or other member of the biſhops chapter, or to the chapter in common, are not conſidered as biſhops teinds. May 23 1797, Solitor of tithes againſt earl of Moray. Fac. Coll. Of courſe they have not the privilege of being liable *ultimo loco*; they belong to patrons under the acts 1690 and 1693, and, as free teinds, are allocated *primo loco*.

[h] 13th July 1774, Ogilvy of Powrie againſt heritors of Methie. The pariſhes of Methie and Inverarity had been united *quoad omnia* above a century. The court having had an extract laid before them from the teind record of the caſe Maxwell of Tinwald againſt Officers of ſtate, 1718, reſolved to follow the precedent, and adopted the preciſe words of the judgment there given, which was as follows: Found that the two pariſhes "being under different patronages, the ſtipend modified is to be divided equally betwixt the pariſhes, eſſeiring to their rentals proven; and that each patron has only right to allocate his proportion thereof within his own right. Fac. Coll.; and Dict. Vol. iv, p. 301.

[i] Dict. V. iv, p. 299.

[k] 7th July 1738, Marſhall againſt town of Kirkcaldy. Kilk. v. Stipend, No. 1, and Dict. Vol. iv, p. 299.

§ 6. STIPEND

the court had ſo far interpoſed as to convert part of the money of a ſecond miniſter's contributed ſtipend into victual, and to determine by whom the ſame ſhould be paid for the future, it afterwards gave the ſecond miniſter an augmentation out of the teinds [l].

STIPENDS being declared free from all burdens whatever [m], it is uſual for the court, when it pronounces decree of locality, at the ſame time to modify a ſum to defray the expence of communion elements. This ſum making no part of the ſtipend, is not due to the miniſter for the years in which he has not adminiſtered the ſacrament, but ought to be paid to the poor [n].

—COMMUNION ELEMENTS.

Bygone.

HOWEVER, a miniſter who had yearly received the allowance, but neglected, for twelve years, to celebrate the ſacrament, was not made to repeat the money [o].

If the teinds are exhauſted.

IF the teinds be exhauſted, the court cannot award an allowance for communion elements out of the ſtock [p].

IN actions of modification and locality, it is neceſſary to call the titular; "and when miniſters of menſal churches purſue for a modification, they muſt call the officers of ſtate; becauſe the biſhops teinds are in the hands of the crown [q]."[2]

June 14, 1749, Fairnie againſt the Heritors of Dunfermline. Dict. V. iv, p. 300.

[m] 1593, c. 162.

[n] Erſk. B. ii, tit. 10, § 50.

[o] Hay againſt Williamſon. July 14, 1780. Fac. Coll. Dict. V. iv, p. 301. The learned reporter obſerves: "The court ſeemed to view this matter in a different light from that of a refuſal to pay communion element money to a miniſter who had failed to employ it for that ſacred purpoſe; in which caſe it appeared that the miniſter would not have been entitled to demand it."

[p] Dict. V. iv, p. 301.

[q] Forbes Treatiſe of Church lands and tithes, p. 386.

§ 6. STIPEND —TERMS.

THE legal terms at which ſtipends fall due to the incumbents, are Whitſunday, when the corn is preſumed to be ſown, and Michaelmas, when it is preſumed to be ped. If the incumbent be admitted before the Whitſunr, he is entitled to the whole year's ſtipend, the ſowing having taken place at his entry. If he be admitted after hitſunday, but before Michaelmas, he is entitled to the f of the ſtipend: Again, if he die before the Whitſunr, he is entitled to no part of the enſuing year's ſtipend: he ſurvive the Whitſunday, but die before the Michaels, he is entitled to no more than the half year's ſtipend: he ſurvive Michaelmas, he is entitled to the whole year's end. Such, too, is the caſe even where the ſtipend is yable by ſpecial agreement at the ordinary terms of Whitday and Martinmas.

DURING a vacancy, the patron is entitled to receive the pend, which, yearly, as it falls due, he muſt apply to pious rpoſes within the pariſh[r]. The king, if he be patron, y diſpoſe of the vacant ſtipend in pious uſes anywhere[s].

—ANN.

IN ſome parts of Germany, after the Reformation, the umbent's widow and children were allowed a year's ſtid, which was called *annus gratiæ*. Hence we have borred our term *ann*, or half a year's ſtipend, which, after miniſter's death, is allowed to his executors over and re what, as ſuch, they may be entitled to. For exle, if he ſurvive Whitſunday, they are entitled to half a 's ſtipend as his executry, and to the other half as ann: e ſurvive Michaelmas, they are entitled to the whole

[r] By the act 1685, c. 18, the penalty is the loſing the right of preſentation on the next turn. By act 1690, it was the forfeiture of the patronage of applying the vacant ſtipend during that and the next vacancy. But patronage being now reſtored, Mr. Erſkine concurs with lord Bankton in thinking, that the penalty contained in the act 1685, is revived.

[s] B. i, tit. 5, § 14.

§ 6. STIPEND —ANN. year's ſtipend as executry, and to another half year's The ann is not affectable by his debts. It veſts confirmation. If there be a widow and no children, one half, and her executors the other. If there be and children, Mr. Erſkine thinks it ſhould, like go one-third to the widow, and two-thirds to the c If there be only children, they get the whole.

THE preſentee, or perſon preſented by the patron, right to the ſtipend by being *collated*, or admitte preſbytery; and forfeits his right thereto by d though not by mere deprivation of his charge[b].

§ 7. CHURCH. Every pariſh muſt have a ſufficient church. Dimenſions. Plan. VII. IN every pariſh there ought to be a ſufficie for the accommodation of pariſhioners. The rule muſt be capable of containing two-thirds of the pa above twelve years of age[c]. If its ſize and dime unexceptionable, which it is the province of the to take care of, "the *plan* of the building may be among the heritors themſelves, without the interv the preſbytery[d]."

In England who repairs the church? IN England, it is ſaid that, by general cuſtom,

[a] B. ii, tit. 10, § 67.

[b] Campbell againſt Macdonald, Feb. 26, 1741. Kilk. v. Stipend, No. 2. Dict. V. iv, p. 299.

After the Reformation, patrons retained their right of preſentation. But by 1649, c. 39, it was aboliſhed: their right was reſtored by the reſciſſory act 1661, c. 9; but by act 1690, c. 23, was again taken away; and an option given to the heritors and elders, and in boroughs to the magiſtrates, to acquire the right, on paying a ſum to the patrons. Some pariſhes did ſo. Thoſe which had not been red reſtored by 10th Anne, Mr. Erſkine obſerves, churches are now patr thoſe the preſentations to ſold in virtue of act 169 tors and ſeſſion having co in the patron's place as of preſenting to the preſb tit. 10, § 29.

[c] June 22, 1787, Minis wall againſt the Heritors

[d] Ibid. Fac. Coll.

3

hurch is to be repaired by the parishioners, and the only by the parson, vicar, or lay impropriator [c]. § 7. CHURCH.

e canon law, the charge of keeping the whole church was, at least in the first instance, imposed on the who was supposed to draw the whole spiritualities, , by the present law of England, is understood to have old of the church and churchyard, as well as a spe- erty in the goods of the church, for the more con- recovery and preservation of things devoted to holy

R the Reformation, an act was passed for "the re- g and uphalding of paroche kirkes, and of kirk of the samin for burial of the dead [g];" and the hereof remitted to the privy council, which [h] laid of the expence upon the parson, and the other two on the parishioners, who were directed to choose cer- he most honest qualified men within their parishes ery one of them effeiring (corresponding) to their e; a burden, indeed, which, if *fructus residui ex bene-* In Scotland after the Reformation.

rson, Vin. Lect. V. i, p. n's Eccl. Law, 321, 8vo, r this purpose the church- ay, by a general summons rch, require the parishion- t and make a rate; and the resent will bind the parish, se officers themselves voted t measure. If the parish- not meet, they may make ithout their concurrence. also that a tax may be laid ng as well as repairing the Woodeson. Ibid. "If a ses to pay the rate, he can sued in the ecclesiastical court, and, on the other hand, he must appeal to that tribunal who thinks himself aggrieved by the tax." Wood. Ibid. Hence it is said, that if the summons to meet be disobeyed, all the parishioners may be excommunicated, and those willing to contribute must be absolved. Watson, c. 39. Woodeson. Ibid.

[f] Woodeson, V. i, p. 271. Ker. Par. Antiq. p. 649.

[g] Queen Mary, parl. 9, 1563, c. 76.

[h] 13th Sept. 1563, Lord Kames' Stat. Law App. No. 2; ratified by act Jas. VI, parl. 3, 1572, c. 54.

§ 7. CHURCH.

ficio were not ſufficient, even the canon law impoſed them, in the laſt place, "as getting the advantage in it the word and ſacraments [i]."

Proprietors.

BUT, by long cuſtom, the expence of repairing, and ev of rebuilding the church, reſts on the landholders [k], w muſt contribute thereto in ſuch manner as, in the circu ſtances of the pariſh, may appear moſt juſt and equitab

In pariſhes partly land-ward.

In landward pariſhes, the uſual rule is according to th ſeveral valuations. But where a pariſh was only partly lan ward, about two-thirds of the pariſhioners reſiding in a tow it was decided in the court of ſeſſion, that the expence building as much of the church as was neceſſary for acco modating the landward part of the pariſh, ſhould be defray by the proprietors of lands according to their valued rents, a divided among them in the ſame proportion; and th the expence of the remaining part ſhould be defraye by the feuars and proprietors of houſes, in proportion t their real rents, and divided among them in the ſame pro portion [l].

PROPRIETORS are liable in their proportion of the ex pence neceſſary for the upholding the church [m], to whic they have been annexed *quoad ſacra*, and, of courſe, not fo upholding the church from which they have been disjoined

[i] Sir George Mackenzie's Obſervations, p. 185.

[k] Erſk. B. ii, t. 10, § 63. Sir G. Mackenzie, in his obervations on the act 1572, c. 54, mentions, "the heritors are only liable."

[l] 20th Nov. 1781, feuars of Crieff againſt the heritors, Fac. Coll.; caſe of Campbeltoun 1774, and St. Andrews 25th May 1791, and Ure and other heritors within the royalty of the borough of Forfar, againſt the heritors of the landward diſtri But, in a latter caſe, that of the tow of Peterhead, a ſimilar judgment the court of ſeſſion was reverſed the houſe of peers; and the expen ordered to be laid on the whole pr prietors, whether of land or houſ according to the real rent of each.

[m] Feb. 2, 1775, Drummond again heritors of Monzie, Dict. V. iii, 370; and, of courſe, ſo too in t caſe of rebuilding the church.

but, for payment of ſtipend as well as other parochial charges, they remain liable in the latter pariſh only. § 7. CHURCH.

IT was decided in the court of ſeſſion, that the heritors have choice of place according to the valuation of their ſeveral eſtates, and that each heritor muſt have a ſeat in the church for his family, diſtinct from the ſhare of area allotted to his tenants; but that, in dividing the whole area of the church, that of each heritor's ſeat muſt be taken *in computo*, in making up his ſhare, correſponding to his valued rent [a]. Seats in the church.

VIII. EACH pariſh muſt alſo have a ſufficient quantity of ground allotted to it for burying its dead. § 8. CHURCH-YARD.

IT has been decided, that where an enlargement of the church-yard is neceſſary, it muſt be furniſhed by the proprietor of ground proper for the purpoſe, who muſt be indemnified by the other heritors in proportion to the number of examinable perſons reſiding upon their eſtates; and (if the pariſh be only partly landward) by the community, in proportion to the number of its inhabitants, reſpectively [b]. What benefit the parochial miniſter has from the graſs growing upon the churchyard, has been already mentioned.

BY act 1597, c. 232, the pariſhioners are ordained "to build and repaire the kirk zaird dykes of their awin paroch kirk with ſtane and mortare, to the hight of twa elnes, and to make ſufficient ſtiles and entrance in the ſaid dykes." But, by long cuſtom, this, like the expence of repairing the church, now reſts on the heritors. The miniſter has not

[a] Dec. 17, 1776, Earl of Marchmont againſt earl of Home. Dict. V. iii, p. 370.

[b] July 5, 1777, Town of Greenock againſt Shaw Stewart. Dict. V. iii, p. 370.

§ 8. CHURCH-YARD.

ſuch a property in the churchyard, as in England is unde ſtood to be veſted in the parſon. Sir George Mackenz in his obſervations on the ſtatute 1572, c. 233, puts t query, to whom coal under the glebe, and trees growi thereon, belongs? The caſe of trees has already been ſpo en to.

CHAP. V.

Public or High Ways.

§ 1. IN GENERAL. What are they?

I. PUBLIC or highways are not conſidered as a ſpecies of ſervitude, but a "reſervation from property, and a neceſſary veſtige of the ancient community of the earth [a]."

Publici juris. Patent to all.

HIGHWAYS are *publici juris*, patent to all without reſpect to any property in land; patent, indeed, even to ſtrangers, who have the freedom of trade, or of travelling through the country.

Why called the king's.

A PUBLIC or highway muſt be conſtituted for public uſe, leading from town to town, or to a ſea port [b]. It is called the king's highway, being *inter regalia* [c].

IN England, the freehold of the highway is ſaid to belong

[a] Stair, B. ii, tit. 7, § 10.
[b] Stair, ibid.
[c] Craig de Feudis, Lib. i, dig. 16, § 16.

§ 1. IN GENERAL.

to the proprietor of the freehold of the adjoinin only the free paſſage to the public[d].

As owner, therefore, he is entitled to all prof as, for example, to the trees upon it, and mine which, with us, belong to the king: as the graſs or the road, "and an arm's length beyond it[f]" does to

Trees. Mines. Graſs.

§ 2. ANCIENT REGULATIONS.

II. OUR ancient law provided for the breadth and conveniency of highways, by various enactm "king's way, or get, ſould conteine in brede fou forty) foote, in the quhilk na damage nor violen done to any man[g]."

Old ſtatutes.

IN like manner, by act 1555, c. 53, thoſe w the highways leading to and from royal borough dained to be puniſhed as oppreſſors. And by

[d] Cok. Inſt. 705.

[e] 1. Burr, 143. Burns, *ad vocem*, V. ii, p. 554.

[f] In ea tamen certum eſt viatoribus equos... paſcere licere; immo et gramina ex ripis carpere et *ultra ripas*, id eſt, ex altera parte ripæ *quatenus brachio* attingere poſſunt. (Craig de Feud. L. i, dig. 16, § 10.)

[g] Stat. David II, c. 26, § 4. And the 12th chapter of the ſtatutes of William ſtates and reſolves the following caſe: "Gif ane man haveand na other thing bot ledeand ane horſe or ane other beaſt in his hand, vpon ane brig; or in anie other ſtrate way, or in anie other dangerous place, occurs or meetes ane other man, ane or mae, drivand before them, and nocht ledeand in their hands, ſindrie horſe, or other beaſtes; or ledeand in their hands horſe charged (bercand laids) over the brig, or in an or way, quhere ane n paſſe by ane other wi bot of neceſſitie the a the other, and leave th turning back agane; he ane horſe or other bea hand, be the law, ſul agane, and ſuffer him hes moe horſe paſs for hie way.

"And gif he quha beaſt will nocht returne thrawertnes paſſes thro drives the many horſe paſſing forwart throw harme or ſkeath is done he ſuld reſtore and ſatis to him quha receaved a and nocht contrarie w na man who is faſt an ſave himſelfe fra him qu

c. 159, perſons who ſtop or impede ſuch highways may be put under caution by the lords of ſeſſion, not to commit the like in time coming, under a penalty. Theſe, however, have been ſuperſeded, in a great meaſure, by ſubſequent enactments; by the two general ſtatutes[h] which intruſt this matter to the juſtices of peace; and by the act 1669, c. 16, "which[i] is penned with ſuch propriety, perſpicuity, and preciſion, "that," (ſays Lord Gardenſtone), "I ſtrongly ſuſpect the modern laws, which have been intended to contrive more effectual meaſures for making and repairing our high-roads, have rather tended to perplex the country, and to mar than to improve the meaſures which might have been taken, under the authority of this plain and good law; happily, however, a great part of it is ſtill in force, and a pretty regular ſyſtem, in conformity to its wiſe directions, has been eſtabliſhed in the practice of this country; which ſyſtem, I am perſuaded, will in a ſhort time be fully effectual, if gentlemen, who have greater paſſion for innovation than they have knowledge for reformation, would only be quiet, and forbear to confound us with new laws, when it is evident that the old one was contrived with great wiſdom and efficacy." However, in regard to the time for calling for the ſervices of the tenants, this ſtatute committed an error, which was corrected by the 9th act of the ſecond ſeſſion of the ſame parliament[k]. and the ſtatute 1686, c. 8[l], ratifying and confirming the above two enactments, communicates the ſame powers, jointly with the juſtices, to the commiſſioners of ſupply. The Britiſh ſtatutes 5 Geo. I, c. 30, and 7 Geo. II, c. 9, confirm the Scottiſh acts, unleſs in ſo far as they are particularly altered.

§ 5. ANCIENT REGULATIONS.

Lord Gardenſtone's advice againſt multiplying turnpike acts.

III. Two general meetings, of the juſtices of peace and

[h] 1617, c. 8, § 8; App. I, xvii; and 1661, c. 38, § 10; App. I, liii.
[i] MS. tit. Highways.
[k] 1670, c. 9.
[l] Parl. 1, Jas. VII.

§ 3. ETING ITS WERS. hen.

commiſſioners of ſupply, muſt be held yearly, to order matters concerning the highways. The firſt meeting is appointed to be held upon the ſame day, and at the ſame place that the commiſſioners of ſupply ſhall be directed by the land-tax act of the year then current, to aſſemble for the purpoſe of aſſeſſing the land tax, &c.: The ſecond upon the ſame day and place that the freeholders are aſſembled at their Michaelmas head court, annually; and the convener of the ſhires are to give the ſame previous notice for the two general meetings, as are given for ordinary general meetings of commiſſioners of ſupply [m].

orum.

ANY five, and, in the ſmall ſhires of Kinroſs, Clackmannan, and Cromarty, any three, whether commiſſioners, or juſtices, or conſiſting of both, are a *quorum*. This meeting may adjourn from time to time. It may chuſe clerks, ſurveyors, and other officers for putting the laws in execution, relating to the highways, bridges, and ferries, and may inflict a penalty of 5l. ſterling on any perſon who ſhall refuſe to accept of the ſaid offices.

t of hways, :

THIS meeting is empowered "to ſet down a particular liſt of the highwayes, bridges, and ferries, within their bounds, and to divide the paroches of the ſaids bounds, as they lye moſt to the ſeveral highwayes to be repaired, and as they may have the moſt equal burden, and to appoint ſuch of their number, or others, overſeers of ſuch parts and portions of the ſaid highwayes as are moſt convenient, and neareſt to their ordinary reſidence; and to nominate ſuch of their number as they ſee fit, to ſurvey and give an account of the highwayes, bridges, and ferries, unto the reſt; with powers to them to appoint meetings from time to time, till the ſaid ſurvey, liſt, and diviſion, of the ſaid highwayes be

[m] 11 Geo. III, c. 53, which ſo far altered 5 Geo. I.

§ 3. MEETING —ITS POWERS.

It is "likewiſe appointed to draw up annually a he condition of the highways, bridges, and ferries, ir bounds, and of the number of men and horſes been employed in repairing the ſame during the year; and this report they are to tranſmit to the ıſticiary at their circuits, and to be recorded in als by the clerks of the peace, or by the clerk of o."

Roads, their width, &c.

: duty of this meeting to take care that the roads l condition; in particular, not leſs than the legal : is, twenty feet, excluſive of the banks and ditches le, or broader, either if the ſame have been ſo be- it ſhall appear beneficial to the public that they roader[q]; nor deep, or foundrous, or deprived of of ſun and wind[r].

o.
c. 33.

ıte 11 Geo. III, c. 53, that "highways and :rywhere be made, 20 lear paſſable road, ex- banks and ditches on where it ſhall appear ublic benefit that any : farther widened and hat fences of any kind ıoved for the purpoſe ſaid roads, they ſhall ıſons in writing, and e to the next, or any eral meeting: And if :eting, after hearing all intereſt, ſhall be of : ſhall be for the public widen and extend the and roads, or to re- ıe ſame ſhall be accordingly done, ſatisfaction being always previouſly made to the owners and leſſees for ſo much as ſhall be taken to widen and enlarge the ſaid highway, over and above 20 feet in width, or the preſent width of the road, if more than 20 feet, and for the loſs or damage the owner may ſuſtain by removing fences." Appeal lies to the firſt general meeting, whoſe award is final.

[r] 7th Geo. II, c. 9, enacts, "that, if the ſurveyors of the highways find any highway and foundrous, and the hedges adjoining to be ſo high as to prevent the benefit of the ſun and winds, the ſurveyors may, in this caſe, make preſentment of ſuch hedges, to the juſtices of peace who live in or near the diviſion where the highway is, at their ſpecial ſeſſions; and the juſtices, or any two of them, upon ſuch preſentment, are

§ 3. ETING, ITS WERS.

If a road cannot be repaired or made of the breadth the law requires, the juſtices of the peace may throw it upon the next adjacent ground [s]. Perhaps, alſo, they may change the direction of a highway to avoid ſteep aſcents, or other inconveniences. It is better, however, that this ſhould be done under authority of ſpecial acts.

anging them.

The act 1696, c. 19, provides, "If any part of the ſaids highwayes cannot well be continued as now they are, but require to be changed, the ſaids juſtices ſhall appoint three of their number to viſit the places where the highwayes need to be changed, and to ſet down meiths or the new way in place thereof, and upon oath to eſtimate the damage of the parties prejudged thereby, and to deliver the ſame to them in writing under their hands, to the effect the ſame may be

empowered to ſummon the occupiers of the lands to which theſe hedges belong, to appear at the next public meeting of the juſtices, to ſhew cauſe why ſuch hedges ſhould not be new made, or cut low. If the highway appear to be deep and foundrous, upon examination, and damaged by the height of the adjoining hedges, the juſtices, or any two of them, are then to iſſue out a precept to the ſurveyors of the pariſh where ſuch hedges are, directing them to leave notice in writing at the place of abode of the proprietor or poſſeſſors of the lands to which the hedges belong, that they are required to new-make the hedges, or cut them low, within 30 days after ſuch notice, (provided the notice be given betwixt the laſt of September and the firſt of February), and if they neglect to do the ſame, the ſurveyors are required to cauſe the hedges to be new made, or cut low, ſo as ſuch hedges ſhall be left three feet high above the bank. The ſurveyors are declared entitled to repayment of ſuch reaſonable expences as they ſhall have been put to in this matter, from the perſons thus neglecting to new-make, or cut low, the hedges; and if theſe expences be not repayed within 14 days after demand, the juſtices, at their monthly meeting in or near the diviſion where the hedges are ſituated, are to iſſue out a precept to the conſtable, or other officers of the place, requiring them to levy, for the repayment of ſuch ſurveyors, ſuch ſums of money as the ſaid expences ſhall amount to, upon the goods of thoſe who neglect to pay." The act, in concluding, provides, that nothing therein contained ſhall alter the laws in relation to timber trees in hedges adjoining to highways, and that all laws in being for amending highways ſhall remain in force.

[s] Kilk. v. Highways.

§ 3. MEETING, —ITS POWERS.

y the whole, in manner therein ſpecified." "Theſe s," ſays lord Gardenſtone, "when fairly done for icement of private improvements, or for public icy, are highly favourable; and though the juſtices eded the exact limits of their powers in the execu- ch new roads, if parties intereſted do not recently , but acquieſce and uſe the new road for ſometime, be barred from any challenge, as was found in e caſes, particularly the caſe of Spottiſwood and f Haldane [t]."

Muſt previouſly aſcertain the damage.

efore giving any order for altering the road, the uſt *previouſly aſcertain* the damages to the proprie- gh whoſe grounds the road is intended to paſs [u].

—CASTING ABOUT.

ncouragement to planting and incloſing, proprie- ermitted, at the ſight of the juſtices of the peace rdinary, "to caſt about the highways, providing ot remove them above 200 ells upon their whole

ghways.

Dec. 17, Juſtices of peace of Clackmannan againſt ites of Stirling.

41, ratified by 1685, c. it not be doubted, what the proviſion in this act it, that the highways be d above 200 ells upon ground; whether is it w road be not above 200 om the point where the gins, to the point where old road again join, as who propoſes to turn the is neighbour's ground is clined to explain it? Or e new road is no where, even upon his own ground, to be above 200 ells diſtant from the old road? And it is thought that this laſt is the meaning, for the words are general that it be not be removed, that is, from the old road, above 200 ells. But it is eaſy to figure how the new road may be even ſhorter than the old, and yet be removed from it more than 200 ells. Suppoſe the old road to form two ſides of a triangle, each 300 ells in length, and the new road to be ſo caſt about as to form the baſe, the new road would be much ſhorter than the old, and yet removed at one point 300 ells from it, which the act does not permit." Kilk. v. Servitude, No. i, 515.

§ 3. MEETING —ITS POWERS.

THE alteration muſt be wholly at the expence of the proprietor, for whoſe accommodation it is done; in particular he is not to be aided by any part of the ſtatute labour[a].

Cannot take away one of two roads.

THE juſtices have no authority to ſtop up one of two public highways[b] which are uſeful to the country.

Shutting up byeways.

THE juſtices, however, have power to ſhut up bye-roads, which are unneceſſary; but not any foot or horſe road to church or mill[c].

Encroachments.

THEY muſt alſo take care that no damage be done to the high-road, or encroachments made upon it[d].

[a] 21ſt July 1724, tenants of Libberton, Laſwade, &c. againſt the juſtices of peace of Mid-Lothian. Edgar, Dict. Vol. iv, p. 200.

[b] Turner againſt the duke of Roxburgh. About a mile from the river Tweed, the highway divided into two branches, the one leading to the paſſage boat, the other to the ford; and from thence, along the river (Tweed) ſide, there is, when the Wooden burn is paſſible, acceſs to the boat alſo. In this latter way, the diſtance to the boat was not 200 yards longer. On the application of the one, and conſent of the other proprietor, "the juſtices granted warrant to ſtop the road leading to the boat, the proprietor being always obliged to make a bridge over Wooden burn at ſight of the juſtices of the peace." But the court of ſeſſion "found the juſtices of the peace had no power to ſuppreſs it; and that the confining the highway to that which paſſes to the ford, does not fall under the powers given to the judge ordinary by the act 1661, and therefore ſuſpended the act of the juſtices of the peace." (Kilkerran, *voce* Highways, No. 1; Falconer, No. 67.) A ſimilar deciſion was given in a later caſe, 7th Aug. 1782, Napier againſt Robertſon.

[c] Kilkerran, *voce* Servitude, No. 1.

[d] The act 1690, "prohibits and diſcharges all perſons whatſoever to break or abuſe the ſaid highways, by plowing up any part thereof, laying ſtones, rubbiſh, or dung, thereon, or any way breaking or pooling the ſame, or turning in, or damming water thereupon; and ordains the conveener of the ſaid juſtices, at their meeting, to take an oath of the remanent juſtices and of the conſtables, of what damage they know done to the highways, bridges, or ferrys, ſince the year preceding, in any of the foreſaid particulars prohibited, or any other, and by whom. Upon which the ſaid juſtices ſhall convene the tranſgreſſors, and, in caſe of conviction by oath or witneſs, ſhall fine

A GATE on a highway, as being an interruption or common nuiſance, is removable, unleſs it has continued from time immemorial [e]. § 3. MEETING—ITS POWERS.

IV. THE ſtatute 13 Geo. III, c. 78, containing many regu- § 4. GENERAL REGULA-
tions reſpecting encroachments on highways, under the TIONS.
rticulars "of trees and hedges, ditches, drains...ſtraw, &c.
id upon it, divers acts of miſbehaviour to be corrected...
gulations reſpecting names on carts and other carriages...
ection-poſts, horſe and foot paths, breadth of wheels,
d number of horſes [f]," is expreſsly limited to England.
t there are other Britiſh ſtatutes which make ſimilar
viſions with reſpect to Scotland [g]. Thus the ſtatute Driver's
th Geo. II, c. 16, § 7, directs, that "if the driver of any negligence occaſioning
riage, on any ſtreet or highway, ſhall by negligence or hurt.
lful miſbehaviour, cauſe any hurt or damage to any perſon Proof.
ſing, every ſuch driver being convicted, either by his own

m as they ſhall ſee juſt, and ſhall
id therefore in manner foreſaid,
d apply the ſame for the uſe of the
d highways"... And it is further
clared, "that where laboured land
s upon the ſides of highwayes, the
id laboured land ſhall be fenced
ith dike and ditch or hedge; yet ſo
neither dike, nor ditch, nor hedge,
r any part thereof, be within the
re-mentioned breadth appointed for
e highway: and in caſe any labour-
l land ſo lying ſhall not be fenced
twixt and the firſt day of Auguſt
xt, then, and in that caſe, the ſaids
ſtices are hereby authorized and
quired to cauſe poind in manner
reſaid, the labourers of the ſaid
nd, for 4s. Scots for each ell which
all n ot be ſo fenced after the ſaid
me, and to apply the ſaids fines for
the fencing thereof in manner forſaid. Likeas, it is hereby declared, that whatſoever ſtones, rubbiſh, or dung or other impediments be thrown or found lying upon the ſaids highways, or water turned in or dammed thereupon, ſhall be eſteemed and held as done by the labourers of the land next adjacent to the highways where the damage is done, who ſhall be fined therefore be the ſaids juſtices and overſeers; reſerving right to the ſaids labourers to call before the ſaids juſtices any other for their relief, who have been the real actors of the ſkaith."

[e] Gardenſtone's MS. tit. Highways.

[f] See Burns, v. Highways, p. 578.

[g] 26 Geo. II, c. 28; 27 Geo. II, c. 16; 12 Geo. III, c. 45.

§ 4 GENERAL REGULATIONS.

confeſſion or by the oath of one witneſs, before an of peace of the county, &c. where the offence is con ſhall for every offence forfeit any ſum not exceeding

Penalty.

ſhall be committed to the houſe of correction for a not exceeding a month; and every ſuch driver offer either of the ſaid caſes, may, without any warrant, b

One juſtice.

hended by any perſon who ſhall ſee ſuch offence con and ſhall be immediately delivered to a peace officer

One witneſs.

der to be conveyed before a juſtice of the peace, to with according to law."

For preventing danger.

BUT, as it is better to prevent than to puniſh ſu dents, there are many precautionary regulations mad view to the public ſafety. Thus it is provided, that driver of any cart, car, dray, or waggon, ſhall ride u ſuch carriage, not having ſome other perſon on foo

Driver not to ride in his cart.

horſeback to guide the ſame, (carts drawn by one ho or by two horſes a-breaſt, and conducted by ſom

Penalty.

holding the reins, excepted), ſhall forfeit 10s. or committed to the houſe of correction for any time ceeding a month, being convicted by his own confe the oath of *one witneſs*, before *any* juſtice of the peac county where the offence has been committed; a ſuch driver may, without any warrant, be apprehe any perſon who ſhall ſee ſuch offence committed, be immediately delivered to a peace officer, in ord conveyed to a juſtice of the peace, to be dealt with ing to law[h]."

IN like manner, "if any chaiſe-driver in Scotla be found ſitting in his chaiſe, without another pe one of the horſes driving the ſame, or if any cart or the driver of any other carriage, (coaches, chaiſe tons, curricles, chairs, and ſuch other carriages, wh

[h] 27 Geo. II, c. 16, § 4.

§ 4. GENERAL REGULATIONS. —12 Geo. III, c. 45.

usually driven by a person sitting within or upon the carriage, and such as are drawn by one horse only, or by two horses a-breast, and are conducted by some person holding the reins of such horses, excepted), shall ride upon any such carriage (not having some person on foot or on horseback to guide the same) on any street of any city or town, or on any highway within six miles of Edinburgh, or four miles of Glasgow, or two miles of any other city, royal borough, &c.; or if the driver of any carriage whatsoever, in any street or highway, shall by negligence or misbehaviour cause any hurt or damage to any person or carriage, or shall prevent or interrupt the free passage of any other carriage, or of persons on the said highways; or if any driver of any cart, &c. on any highway, when riding on his carriage, shall not dismount (so as the better to guide his horse or carriage) when required by any person apprehending danger, every such driver for every such offence, shall forfeit a sum not exceeding 10s. if he is not the owner, and if he is the owner, not exceeding 20s. sterling [a]."

If hurt be done through negligence.

It is farther provided, "that no driver of carts or other carriages shall drive a-breast, so as to obstruct the free passage of streets and highways, but shall follow one after another, and shall have bridles or halters upon every horse, which bridles upon the foremost horse shall (in all carriages drawn by two horses) be tied with a rope to the halter or bridle of the horse behind, and which rope or bridle the driver shall have in his hand; and the offender in the premises shall forfeit not exceeding 20s. and not less than 5s. sterling [b]." "No drivers of horses or other beasts shall drive them so as wilfully to obstruct the free passage of his majesty's subjects, or to put their persons in danger, but shall drive them in a line, having a bridle or halter affixed to the

Carts not to go a-breast.

Free passage not to be obstructed.

[a] 12 Geo. III, c. 45, § 5. [b] Ibid. § 6.

§ 4. GENERAL REGULATIONS. —12 Geo. III, c. 45.

head of each horſe or beaſt; and the driver or own cart or other carriage ſhall not be permitted to leave on any ſtreet or highway after the horſes have been except during the time the ſame ſhall be loading or ing; nor ſhall it be allowable to any perſon to lea

Carts, &c. not to be left in the ſtreets.

lime, timber, rubbiſh, dead horſes, or other animals, nuiſances, upon the ſtreets and highways, ſo as to o free paſſage; and every perſon offending in the ſhall forfeit not exceeding 20s. and not leſs than 5s for each offence [c]." "The driver of every ſuch loa or other beaſts of burden, and the driver of every or the like carriage, and every coach, &c. and ſuch

Carriages meeting one another.

riage, ſhall be obliged on meeting another loaded carriage, to make way by holding to his own left to the *near ſide*; and every perſon offending in the ſhall forfeit not exceeding 20s. and not leſs than ling [d]."

AND farther, it is provided by the ſame ſtatute, ſon ſhall drive any cart, car, with or without ledge waggon, ſledge, or dray, upon the high-roads or Scotland, unleſs the maſter or owner of ſuch cart, place upon ſome conſpicuous part thereof, the nam owner and his place of reſidence, or of the houſe where the owners generally employ ſuch carriage, ent colours from the body of ſuch carriage; and numbers, where more carts, &c. than one belon ſame perſon, in order that the driver may the more convicted of any miſbehaviour committed by him any perſon ſhall drive ſuch carriages upon any ſuch ſtreets, not having the name, place, and number, ſaid, placed in ſome conſpicuous part of the ſame, forfeit a ſum not exceeding 20s. and not leſs than

Maſter's name.

Penalty.

[c] Ibid. § 7. [d] Ibid. § 8. [e] Ibid. § 9.

§ 4. GENERAL REGULATIONS. —12 GEO. III, c. 45.

ing for each offence [f]." "If the property of ſuch carriages ſhall be altered, the ſucceeding owners ſhall, within 14 days after they ſhall become owners and ſhall have uſed the ſame, cauſe the names and reſidence of the former owners, and number to be taken off, and their own name and place of reſidence, and a new number to be placed, in manner foreſaid, upon ſuch carriage; and every perſon omitting to do the ſame ſhall forfeit 20s. and not leſs than 5s. ſterling [g]." "If any perſon ſhall place a falſe name or place of reſidence upon his carriage, he ſhall forfeit a ſum not exceeding 40s. ſterling [h]."

Juriſdiction.

[f] Ibid. § 2.

[g] Ibid. § 3.

[h] Ibid. § 4. Proſecutions againſt offenders puniſhable by this 12 Geo. III, c. 45, may be brought ſummarily before the ſheriff, or any juſtice of peace where the offence ſhall be committed, or before any of the magiſtrates of cities or boroughs where offences have been committed within their juriſdiction, or before any other judge competent; and judgment ſhall be given againſt the offender upon confeſſion, or upon oath of one witneſs. § 9.

In all the neglects and offences puniſhable by this act, any perſon aggrieved, and intending to ſue for the penalties upon the authority of the act, without any other warrant, may apprehend the offender, and either convey him by the aſſiſtance of any peace-officer, or other perſon, before any juſtice or other judge competent, who is required, upon conviction of the offender, by confeſſion or oath of one witneſs, to deal with him as before directed; and any perſon who ſhall ſee any of the offences committed, may, by this act, without any other warrant, ſeize and detain the horſes, carts, &c. till ſentence ſhall be pronounced by the judge; and in caſe the penalties ſhall not be paid, or ſecurity found for the ſame, within 24 hours after conviction and ſentence, then the judge ſhall iſſue his warrant to a conſtable to cauſe ſale be made of the ſubjects retained, in caſe the ſame be the property of the offender, for raiſing the money forfeited, rendering the overplus, after deducting charges of ſale, and the expence of keeping the ſubject, both which ſhall be determined by the judge before whom the offenders are convicted; and if the ſubject is not the property of ſuch offender, the ſame ſhall be returned to the owner; and the judge, in caſe the fine ſhall not be inſtantly paid, or ſecurity given, may commit the offender to gaol until paid, or ſecurity found for the ſame, or until the expiration of two months after commitment. § 11.

If any perſon charged with offences againſt this act ſhall, upon the ſeiz-

§ 4. GENERAL REGULATIONS.

AND, on the narrative that it had become "a common practice to get materials out of commons, heaths, and waſte grounds, for the repairs of the highways of this kingdom and for other purpoſes, and to leave the pits and holes thereby occaſioned open and dangerous," the ſtatute 26 Geo. II. c. 28, enacts, "if any perſon, by reaſon of getting any materials for repairing any highway, or other purpoſe, ſhall make any pit or hole in any common, heath, or waſte ground, he ſhall forthwith cauſe the ſame to be fenced off during the time it ſhall be open; and ſhall, within 14 days after digging for ſuch materials, cauſe the pit to be filled up, ſloped down, or fenced off, and ſo continued; and on neglect ſo to fill up, &c. any juſtice may order ſuch perſon to fill up, &c. or to repair ſuch fence from time to time: and in caſe ſuch perſon ſhall refuſe, or neglect to comply with ſuch order for 10 days after the receipt thereof, or the ſame being left at his abode; on due proof by oath before any juſtice, of the offence, of the ſervice of the order, and of the neglect, ſuch perſon ſhall forfeit a ſum not exceeding 10l. nor leſs than 40s. to be applied in filling up, ſloping down, or fencing the ſaid hole, and towards the repair of the roads in the place

Pits made in the highway.

One juſtice.

ure of their perſons or property, or the property of others under their care, reſiſt, abuſe, or maltreat, any perſon whatſoever; or if any perſon ſhall aid them in ſo doing, he ſhall forfeit 20s. for every offence; the offences to be proved, and judgment to proceed thereupon, in the ſame way as before provided for in the caſe of the other offences againſt this act. § 11.

Perſons apprehended for offences, and refuſing to diſcover their names and places of abode to any judge, ſhall be committed until they do ſo. § 12.

The fines and forfeitures ariſing by this act ſhall be, one half to the informer, and the other to the collector of the land-tax, to be accounted for as part of the funds for the detection and puniſhment of vagrants in the land. § 13.

No proſecution ſhall lie against any perſon unleſs brought within three months; and in all caſes an appeal ſhall lie to the next quarter ſeſſions of the peace for the county whoſe determination ſhall be final. § 14.

Nothing herein ſhall limit or take away the juriſdictions, privileges, or immunities, of any of the cities or royal boroughs in Scotland. § 15

the juſtice ſhall direct; the ſaid forfeiture to be levied by breſs and ſale of the offender's goods, rendering the over- s to the owner, after deducing the charges of the diſ- k."

§ 4. GENERAL REGULATIONS.

r. For repairing the roads the juſtices and commiſſioners pply are entruſted with the charge of the ſtatute labour; is, the calling out the tenants, cottars, and houſeholders, g authorized to give order as "they ſhall ſee moſt con- ent, and with leaſt grief to the ſubject for mending all ways and paſſages to or from any market town, or ſea- within the ſhire [a]."

§ 5. STATUTE LABOUR.—WHO LIABLE?

y the act 1669, c. 16, the juſtices were required "to rene all tenants and cottars, and their ſervants, who to have in readineſs horſes, carts, ſledges, ſpades, ſhovels, s, mattocks, and ſuch other inſtruments as ſhall be re- red."

The act 1670, c. 9, allowed the juſtices to compound, ertain circumſtances, with the perſons liable in the ſtatute ck.

By the ſtat. 5 Geo. I, c. 30, § 3, the juſtices and the com- ioners of ſupply were ordained "to convene the tenants, ers, and other labouring men, within their bounds, for the iring of the highways. This includes the whole inhabit- s within the county [b]; even inhabitants of royal boroughs, ermen, boatmen on the ferry [c], tradeſmen and artificers [d],

Inhabitants of royal boroughs.

1617, c. 8.

By the ancient common law of land, no perſon was exempted this burden, which made part *trinoda neceſſitas*. (1ſt Blackſt. ment. 357.) So alſo the Roman *domus etiam divinas tam laudabili libenter adſcribimus*. (Lib. iv, Cod. de Privilegiis Domus Auguſtæ, &c.)

[c] 24th July 1750, Hamilton againſt town of Kirkcaldy, Falconer.

[d] 11th June 1758, truſtees of Glaſgow turnpike againſt inhabitants of Paiſley. Dict. Vol. iv, p. 201.

§ 5. STATUTE LABOUR —WHO LIABLE?

and other inhabitants in general [e]; but ſailors who make coaſting voyages, or to foreign parts, were found not to be liable [f], nor colliers, gateſmen, winleſſmen, and watermen employed in coalworks [g].

Heritors. HERITORS are not ſubjected by the act 1669, c. 16, in any part of the burden, unleſs ſo far as may be neceſſary for ſupplying the deficiency in the ſtatute labour [h].

[e] In the caſe of Paiſley the deciſion was,—"That the whole inhabitants of the town of Paiſley may be called out to repair the high-roads in time coming." In a reclaiming petition, a general exemption of all the inhabitants within the borough was not inſiſted for, but only in favour of merchants, artificers, tradeſmen, as alſo peers, judges, clergymen, women, &c. none of whom could come under the deſcription of labouring men, tenants, cottars, or their ſervants: "The lords adhered, and refuſed the petition, reſerving to the inhabitants, or any claſs of them who ſhall think themſelves aggrieved, to apply for redreſs as accords." 11th Jan. 1758. Dict. V. iv, p. 201.

[f] 24th July 1750, Hamilton againſt the inhabitants of Kirkcaldy. Falconer.

[g] 7th March 1755, earl of Eglinton againſt the juſtices of peace for the county of Ayr. Dict. V. iv, 201.

The argument uſed was not only that thoſe people were *adſcripti glebæ*, and by 1 parl. Cha. II, ſeſſ. 1, act 56, obliged to work all the ſix days of the week, except at Chriſtmas; but alſo, that were coalliers diverted from their proper work for ſix days yearly, irreparable damage might enſue to their maſters. The latter reaſon may ſeem to juſtify exemption even yet, if not in whole, at leaſt partially, notwithſtanding the alteration that has ſince taken place in their condition.

[h] "And becauſe the work of the inhabitants within the ſeveral bounds will not be able ſufficiently to repair the highways and others foreſaid, therefore his majeſty with advice and conſent of the ſaid eſtates, doth hereby authorize and require the whole freeholders and heritors of the reſpective ſhires, to convene at the reſpective head boroughs, the ſaid firſt Tueſday of June yearly, and to call for an account from the juſtices of peace of what is needful for the reparation of the highways and others foreſaid, and what charges and expenſes is requiſite for promoving thereof, and for making or repairing bridges and ferries where they ſhall be found needful, and accordingly to ſtent the heritors of the ſaid ſhire, comprehending the heritors of the boroughs lands therein, in what ſhall be found neceſſary for the effect foreſaid, not exceeding 10s. Scots upon each rood of valued rent in one year, which is to be upliſted by the ſaid juſtices, or whom they ſhall appoint, by public

act 1669, c. 16, appoints the ſheriff, one of his de- § 5. STATUTE LABOUR —WHO LIABLE?
uſtices of peace, or ſuch of them to whom particular
the highways ſhall be committed, to call tenants,
and their ſervants, "by public intimation at the
irks on the Sabbath-day, immediately after the firſt Nature and extent of the ſtatute labour.
or any other way that they ſhall think fit, to have in
s, horſes, carts, ſleds, ſpades, ſhovels, picks, mattocks,
other inſtruments as ſhall be required, for repairing
aids highwayes, and to conveen at ſuch places thereof Intimation.
hall be required, and in ſuch proportion, and with ſuch
e, as the ſaids juſtices or overſeers ſhall appoint, and
the moſt equal and proportionable way, as the ſaids
and overſeers will be anſwerable: with power to
deſign ſuch of the ſaids perſons as they find to be
lful, to attend and direct the reſt, and to appoint
wages for their attendance."

E who have carts and horſes are bound to bring them, Carts and horſes.
o give their perſonal labour only, with ſuch inſtru-
s the act requires, or otherwiſe as the truſtees may Inſtruments.
oper. Neither have the ſtatutes aſcertained the num-
arriages to be performed by each tenant according to
nt of his farm or otherwiſe; all this is intruſted to
etion of the juſtices.

perſons liable muſt be convened, three days before the Seaſon of the year.
June, not being in ſeed time; and three days after
yearly, until the highways, bridges, &c. be ſufficiently
d. This regulation, though chiefly calculated for
veniency of the country labourers, yet applies to
ly who are liable to be called out. This act of 5
ſo far repeals former acts, as to limit the time for

is/ and employed for the ſaid heritors at the next Michealmas
id, and of which they ſhall head court yearly."
to give an account to the [1] 5 Geo. I, c. 30, § 3.

§ 5. STATUTE LABOUR —WHERE.

calling out people liable to work before harveſt, that it ſhould be before the end of June [k].

Places.

THE act 1669, c. 16, ordains the perſons liable in ſtatute labour "to convene at ſuch places as ſhall be required, and in ſuch proportion and with ſuch furniture as the ſaid juſtices or overſeers ſhall appoint, and that in the moſt equal and proportionable way, as the ſaid juſtices and overſeers will be anſwerable." The ſtatute 5 Geo. I, c. 30, ſays "on ſuch days, and at ſuch places, as the commiſſioners or their officers ſhall appoint [l]."

[k] Dec. 17, 1760, Walker and Herd *ag.* Thomſons. The juſtices of peace of Kincardine having warned the tenants and labourers to come out to perform the ſtatute work upon the 15th, 16th, and 17th days of Auguſt, and granted warrant for poinding the effects of the deficient, to the extent of the compoſition-money; which was accordingly executed; the tenants whoſe goods were poinded, brought an action for reſtitution, and for damages and expences, againſt the juſtices, on the ground of their being called out in time of harveſt, contrary to the act 5 Geo. I, which limits the term for calling them out, to be before the laſt day of June. The juſtices inſiſted chiefly, that the ſtatute was in non-obſervance, and that harveſt was not actually begun, although the purſuers had cut ſome green corn to give a pretence for their plea. The court of ſeſſion decided, that the warrant granted for poinding was illegal, as the tenants were not ſummoned within the time limited by the ſtatute; and that the juſtices were liable in reſtitution of the goods, and in expences of proceſs. Of courſe, it is a perpetual law with regard to the other clauſe alſo, the time of exacting the work after harveſt. The act 1669, c. 16, had provided "that the number of days do not exceed ſix days for man and horſe yearly for the firſt three years, and four days yearly thereafter, and that they be only betwixt the bear-ſeed yeard and hay time or harveſt thereafter." And the ſtatute 1670, c. 9, upon the conſideration that the time appointed by it for working at highways is limited betwixt ſeed time and harveſt, and that it will be more convenient to work at, and repair ſeveral highways at other ſeaſons of the year, empowers, upon that account, the ſheriffs and juſtices to require the perſons liable to work at and repair highways, bridges and ferries, to convene for the number of days they are liable, at any time or ſeaſon which ſhall appear moſt convenient, ſeed time and harveſt excepted.

[l] Juſtices of peace and commiſſioners of ſupply for the county of

PERSONS who live at ſuch a diſtance, that they cannot go d return in the ſame day and do a day's work, cannot be led out under any higher penalty than that ſpecified by act 0, c. 9[m]. The act directs, "where the ways lie at t diſtance from thoſe who are liable to repair the ſame, it ſhall be leiſome to the ſaid juſtices and overſeers to ence with thoſe perſons who live at ſuch a diſtance, they ng 6s. yearly for ilk man, and 12s. for ilk horſe, which it to have been employed in the ſaid work." This is the exception. Every other perſon muſt perform his ſtatute ur, or pay 1s. 6d. for every day's failure, unleſs he ſend n to work for him[n]. § 5. STATUTE LABOUR —WHERE. Perſons living at a diſtance.

AYMENT of the penalties may be enforced by diſtreſs and ding[o]. —PENALTIES.

againſt the tenants of Colding- , 4th Jan. 1757. In this caſe, nants complained that the road were called out to repair lay at a diſtance, while nearer roads lay aired. The court of ſeſſion decid- that the juſtices of peace and ſioners of ſupply have a diſ- nary power to determine what ſhall be firſt repaired, and to e the ſhire into diſtricts.

th Jan. 1757, juſtices, &c. of the y of Berwick againſt tenants of ngham. Fac. Col.

Geo. I, c. 30, § 3. In one caſe, ſtices of peace were ſanctioned in leſs than the ſtatutory penalty. ſtices of peace had made an or- t the ſix days labour ſhould, in t place, be applied in the re- of one highway, and allowed ſition for thoſe who lived at ce, below the rate of the legal ſition. Some having refuſed to pay, as not being bound to perform ſix days labour on diſtant roads, nor to pay any compoſition for it, the court of ſeſſion refuſed their bill of ſuſpenſion. 15th Feb. 1754, viſcount Arbuthnot againſt the juſtices of peace of Kincardineſhire. Fac. Col.

[o] 5 Geo. I, c. 30, § 4.

The direction of the act 1669 was, "providing that the days they are required to work do not exceed the number of ſix days for man and horſe yearly for the firſt three years, and four days yearly thereafter, and that they be only betwixt the beer-ſeed yearly, and haytime or harveſt thereafter: with power to the ſaids juſtices or overſeers to poind the readieſt goods of the abſents, for 20s. Scots money for the abſence of ilk man daily, and 30s. for the man and horſe, without farther ſolemnity but appriſing the ſame upon the ground of the land, and

§ 5. STATUTE LABOUR —PENALTIES.

THE act 1670, c. 9, ordains the 6s. yearly for every man, and 12s. for every horſe, which ought to have been employed in the ſaid work, to be expended at the ſight of the ſaid ſheriff and juſtices, on workmen to work in place of thoſe who live at ſuch diſtances, in manner foreſaid. And 5 Geo. I, c. 30, § 7, enacts, that "the penalties in this act, (other than ſuch as ſhall be incurred by the tenants, &c.) ſhall be levied by ſentence of the juſtices, and commiſſioners of ſupply, or any five of them; and the expence of the proſecution ſhall be defrayed by the ſhires and ſtewardries, at the ſuit of ſaid ſurveyors; and ſuch penalties ſhall be applied for repairing ſuch highways, &c. as the juſtices or commiſſioners of ſupply ſhall appoint; and in default of ſuch appointment for repairing ſuch highwayes, &c. as the lords of juſticiary in their circuits ſhall appoint [P]."

Application of the penalties.

therewith to hire others in place of the abſents; and in caſe the ſaids abſents ſhall have no poindable goods, to puniſh them in their perſons as they ſhall ſee cauſe."

P The juſtices of Berwickſhire and commiſſioners of ſupply, at two general meetings, as juſtices of peace and commiſſioners of ſupply had ordered, that two highways in the county ſhould be repaired in preference to the reſt, and had fixed a compoſition to be paid in money, in caſe the labouring men ſhould fail to attend at the reparation of theſe highways, and becauſe they ſuſpected that ſome oppoſition would be made to the proceedings, had come to the following reſolution: "To empower a committee to name one or more proper agents at Edinburgh for defending and diſcuſſing any bills of advocation or ſuſpenſion that might happen to be offered againſt the proceedings of the meeting, or thoſe acting under their authority, and to empower the committee to draw upon the collector of ſupply for the neceſſary ſums to be paid out of the highway and bridge money in his hands." In conſequence of this reſolution, the expences of a law-ſuit againſt ſome of the inhabitants of the county, who had refuſed to comply with the orders of the commiſſioners of ſupply, was paid by the collector, and this payment was approved of unanimouſly in an after meeting of the commiſſioners. The purſuers who had been averſe to the whole proceedings, executed a ſummons of declarator and repetition againſt the commiſſioners, of the following purport: "That the expending the highway and bridge money in a law-ſuit was illegal; and that the defenders conjunctly and ſeverally ought to be decerned to refund to the collector the foreſaid ſum

§ 4. TURNPIKE STATUTES.

rnpike ſtatutes being each an entire code, reſpect- rticular county for which it is made, and differing nother according to the inclinations, knowledge, or accuracy of the perſons under whoſe direction ſpectively applied for, do not fall to be here ex- Their clauſes are to be interpreted according to inciples of law; and the conſtruction of ſuch of ave occaſioned any general queſtions, touching, ple, the review of the ſupreme courts, has been en notice of. Here, therefore, it is only neceſſary ſuch general regulations as are contained in pub-, obligatory throughout the whole country; and erefore, muſt regulate the conduct of all truſtees h turnpike acts, as contain no ſpecial exception trary. In moſt of the turnpike acts, it is ſpecially what qualification is neceſſary to act as truſtee; neral ſtatute, 25 Geo. III, c. 82, provides, "that all gs of the truſtees, for the care of turnpike-roads, gs where any perſon has acted as a truſtee, with- regularly appointed, ſhall be valid; and he ſhall ble to any proſecution on that account, if, at the cting, he had an eſtate ſufficient to qualify him, aken the oath required."

Qualification.

ER, the general ſtatute 18 Geo. III, c. 63, § 1, "that where the truſtees appointed by any acts repairing turnpike-roads, ſhall not have met on the inted for their firſt meeting, &c. it ſhall be lawful e of the ſaid truſtees to cauſe notice to be affixed turnpike gates erected on ſuch roads; or if there o turnpike gates, to cauſe the like notice to be af- ſome conſpicuous place, in one of the neighbouring

Notice of the place of acting.

d to employ the ſame as &c." The court decided ney was properly applied. 757, Charteris againſt ſir Robert Pringle of Stitchell and other juſtices of peace and commiſſioners of ſupply in Berwickſhire. Fac. Coll.

§ 4. TURNPIKE STATUTES.

market towns, and alſo to be publiſhed in ſome newſpaper circulated in that part of the country, at leaſt 20 days before the intended meeting; and the ſaid truſtees, when met, are hereby empowered to carry ſuch acts into execution."

In like manner, the ſtatute 32 Geo. II, c. 15, contains a great number of general regulations. Thus it is provided[a], that all carriages drawn by more than four horſes, or other beaſts of draught, ſhall pay 5s. of additional toll for each horſe or other beaſt. And farther, it is provided, that "no waggon or other carriage ſhall be drawn by more than eight horſes, or other beaſts of draught, upon any turnpike road in Scotland, on pain of forfeiting 5l. ſterling for every ſuch offence; one half to the informer, and the other half to be applied to repairing the road where the offence is committed, as the truſtees ſhall appoint;" but with this exception, "that nothing in this act ſhall extend to reſtrain the owner of any carriage, or his ſervants, drawing with as many horſes or beaſts of draught as ſhall be neceſſary for drawing up any ſteep hill, as the truſtees within their reſpective diſtricts where ſuch ſteep hills lie ſhall direct; a copy of which direction, under the hand of the clerk of the truſtees, ſhall be kept by the perſon empowered to levy the tolls at the toll-gate next to ſuch hills; and ſhall, without fee, be made patent to the owners of ſuch carriages paſſing the road, or their ſervants;" and excepting thoſe carriages whereof the fellies of the wheels are nine inches broad[b]; carriages employed in carrying one tree or piece of timber, one ſtock or block of marble, or any machine in one piece, which cannot be drawn by fewer than four horſes[c]; waggons, &c. drawn by oxen or neat cattle only, or along with two horſes, and no more[d]; excepting alſo coaches, chaiſes[e] marine, coach, chariot, landau, berlin, chaiſe, chair, or calaſh.

More than four horſes.

More than eight.

Exceptions.

[a] § 1. [b] § 4. [c] Ibid. [d] Ibid. [e] Ibid.

FARTHER, the truſtees, or any five of them, under the eral turnpike acts, are authorized, by a writing under ir hands, to order the fellies of the wheels of all waggons l other carriages, which ought to be of the breadth before cted, to be meaſured at any turnpike upon any part of highway upon which ſuch carriage travels [e]. "If any ſon ſhall attempt to prevent the meaſuring the fellies of wheels, or uſe any violence to any perſon employed in meaſuring, every perſon ſo offending, and convicted re the truſtees, or five of them, upon the oath of one neſs, ſhall forfeit 5l. ſterling; one half to the informer, the other half to be applied to repairing ſuch part of the d as the truſtees ſhall appoint [f]." § 4. TURNPIKE STATUTES. Meaſuring the wheels.

AND farther, for preventing evaſions, it is provided, that f any perſon ſhall take off any horſe or other beaſt of ught from any carriage, at or before the ſame ſhall come ny turnpike, with intent to avoid paying the additional , every perſon ſo offending, and convicted before the ſaid tees, or five of them, upon the oath of one witneſs, ſhall feit 20s. ſterling; one half to the informer, and the other f to be applied to repairing ſuch part of the road as the tees ſhall appoint [g]." Evading tolls.

LASTLY, it is directed, that "all tolls and forfeitures by

[e] In caſe it ſhall appear to the s appointed to meaſure the ſaid s, that the fellies of the wheels originally of the breadth of nine r inches reſpectively, and by ng have been reduced to leſs th, it ſhall be lawful for ſuch ge to travel upon any turnpike ſo as the fellies of all the wheels tively be not diminiſhed more ne inch of the full breadth re- by this act."

[f] § 11.

[g] § 21. And by § 3, "Every perſon who ſhall drive any waggon, &c. upon any part of any turnpike road, with more horſes than ſuch carriage ſhall on the ſame day paſs through any turnpike bar with, ſhall be deemed to have taken off the ſaid horſes with intent to avoid paying the additional toll."

§ 5. TURNPIKE STATUTES.

this act impoſed, if not otherwiſe directed, ſhall be levied by diſtreſs of the offender's goods, by warrant of any two juſtices of peace for the county or place where the offence is committed; and the perſons diſtraining are to ſell the goods diſtrained, and return the overplus money, if any, upon demand, to the owners, after ſuch tolls or forfeitures, with the charges of diſtreſs, are deducted and paid. If any perſon think himſelf aggrieved by any order of the truſtees or juſtices, it ſhall be lawful for him to appeal to the juſtices of peace for the county or place where the cauſe of appeal ariſes, in their general quarter-ſeſſions, who are to determine the matter in diſpute, and whoſe order therein ſhall be final. If any action be brought againſt any perſon for any thing done in purſuance of this act, every ſuch action ſhall be brought within one month after the fact done."

Appeal.

§ 6. BRIDGES AND FERRIES.

VI. THE ſame ſtatutes which give the juſtices of peace charge of the highways, mention alſo bridges and ferries and here they require again to be noticed only ſo far as they relate to the latter. Juſtices of the peace are empowered by the ſaid ſtatute 1669, c. 16, "to viſit the ferries in their ſhire, and where ferries lie betwixt two ſhires, that they correſpond with the juſtices of the other ſhire, to the end they may appoint fit and ſufficient boats, and convenient landing places, and ſo to regulate ferries as that the liege may be readily and conveniently ſerved, and at reaſonable rates; and to puniſh ſuch as ſhall neglect or tranſgreſs the rules eſtabliſhed by them." And by the ſtatute 1686, c. 1 "where bridges and ferries are upon the confines of two ſhires, it being juſt that both ſhires be burdened with the expence of reparation, the juſtices of peace and commiſſioners of ſupply in both ſhires are ordained to meet and adjust the expence of reparation proportionably, according to their reſpective valuations of the ſhires; the ſheriffs of the ſaid ſhires, or their deputies, to convene them; and in caſe the

meet, general letters to be directed for charging that effect." § 6. BRIDGES AND FERRIES.

he act of the privy council 1669, c. 16, it was or- that moderate cuſtoms ſhould be levied at bridges, ys, and ferries, for the building, repairing, and up- thereof. And the act 1686, c. 8, ordains, "that the hires and burghs be holden to repair the preſent ſtand- ges within their reſpective bounds, and to uphold the nd if they ſuffer them to fall, the privy council be red to fine them in as much as will repair or rebuild idges." Under which ſtatutes, it has been frequent- ed, that the inſpection and regulation of ferries be- the juſtices of peace [h]. In like manner, it has been

ug. 1775, juſtices of Mid- gainſt Galloway and others, l. iii, tit. Juriſdiction; and 1762, juſtices of peace for y of Fife againſt the magiſ- Kinghorn, ibid.

magiſtrates of Kinghorn following regulations: 1mo, h perſon paſſing the ferry Sunday ſhould pay half a ove the ordinary freight. at no perſons within the uld let horſes to hire, with- entered burgeſſes, and pay- Scots; and that no burgeſs t horſes or chaiſes within , without allowance of the r. 3tio, That all who let chaiſes within the town, who being caſually there tour hire, ſhould pay 5 per he town, in name of port- , That each ton of wine Kinghorn from the paſſage uld pay five ſhillings of s to the town. And, 5to, That no perſon ſhould act as boatman till he was admitted a burgeſs. The juſtices of peace of the county brought an action, concluding for reduction of the above regulations, as the ma- giſtrates had no power to regulate the ferry or boatmen. The magiſ- trates founded on a charter, contain- ing a grant of the harbour and port, with cuſtoms, anchorages, and all other duties and caſualties; and as to the other regulations, they urged, that they were conſiſtent with their powers as governors of the burgh. The court of ſeſſion decided, that the regulation of the ferry belonged to the juſtices of the peace; reduced the whole du- ties and taxations complained of, ex- cept the duty on the ton of wine im- ported; and reduced likewiſe the regulation with reſpect to burgeſs inhabitants only, plying at the ferry, and letting chaiſes and horſes. June 14, 1762, earl of Moray and juſtices of Fife *contra* magiſtrates of King- horn." Dict. Vol. iii, p. 102.

§ 6. BRIDGES AND FERRIES.

decided that they have the charge of repairing bridges even lying within the juriſdiction of a royal borough[1].

§ 7. INNKEEPERS.

VII. As roads and ferries are of ſmall conſequence without inns and other conveniencies for poſting, a few obſervations may here be made upon theſe ſubjects, which are properly, indeed, a branch of police.

ANY combination to raiſe the rates of poſting is equally illegal with other combinations to raiſe wages or the price of labour, and may be checked and puniſhed by juſtices of peace.

BESIDES this, however, the Scottiſh juſtices have been in the practice of interfering to regulate the rates of poſting; though ſuch juriſdiction is not expreſsly conferred on them by any ſtatute. In England, the juſtices of peace exerciſe no ſuch power. In 1760, the juſtices of peace for Mid-Lothian fixed the hire for a chaiſe and two horſes, travelling poſt, at 9d. per mile. In 1795, certain poſt-maſters in Edinburgh, notified, by advertiſement in the newſpapers, that they meant in future to charge 1s. per mile, excluſive of the king's duty. Upon this the procurator-fiſcal for the county preſented a complaint to the juſtices, praying that

1 Dict. V. iii, t. Juriſdiction, p. 358. The magiſtrates of Paiſley having refuſed their concurrence to a ſcheme of erecting a bridge over the river for the convenience of the inhabitants of a ſuburb of the town, which was propoſed to be executed at the expence of the inhabitants themſelves, they applied to the juſtices of peace, who authorized the bridge to be built. The magiſtrates ſuſpended the decree of the juſtices, and argued, that the latter had no juriſdiction over bridges, highways, &c. lying within the magiſtrates territory, as the town had, by their charters, every privilege of a royal burgh, except ſending a member to parliament. Anſwered, The ſtatutes on which the juriſdiction of the juſtices is founded, make no diſtinction whether the bridges or highway lie within the territory of a burgh or not. The court of ſeſſion ſuſtained decree of the juſtices. Feb. 27, 1759, inhabitants of Smedden *contra* magiſtrates of Paiſley.

maſters ſhould be prohibited from making any addi- § 7.
heir fares without their authority. The defenders INNS.
the juriſdiction of the court. The juſtices, 28th
1795, found "it proven, by the admiſſion of the
rs, that the combination complained of, and the in-
of the fares for poſting, by their own authority, and
ıg the ſame in the Edinburgh newſpapers, was ille-
unwarrantable, and in contempt of the authority of
t; therefore prohibited and diſcharged the ſaid de-
and all others concerned within this county, from
; a higher rate of fares than thoſe which were in uſe
xacted previous to the attempt made by them in
793, until otherwiſe ordered by the juſtices; and
ler the penalty of 20s. ſterling for each tranſgreſſion:
: meeting further appointed the juſtices preſent a
ee, any three a quorum, to meet at ſuch times and
s they ſhall think fit, to take into conſideration the
ns of the juſtices of the peace now exiſting, relative
res exigible by the poſtmaſters, with power to re-
:h propoſitions as the poſtmaſters ſhall think proper
:fore them, and to report the whole to the next, or
lequent meeting of the quarter ſeſſions;" and, after
parties, "refuſed the poſtmaſters application for a
heir fares for poſting, adhered to the judgment pro-
l on the 28th October laſt, and continued the inter-
reby granted."

defenders complained of theſe judgments by a bill of
ion, ſtating both the grounds on which they thought
:aſe of their fare reaſonable, and alſo the argument
from which they inferred that the juſtices had no
l over them.

court of ſeſſion, though divided in opinion, inſtructed
l ordinary to refuſe the bill as to the competency of

§ 7. INNS.

the juſtices of peace; but to paſs the bill, to the effi ing the queſtion as to the amount of the fares fo the complainers being, in the meantime, at liberty 1s. 2d. per mile, duty included.

THIS deciſion was affirmed on appeal. But th reporter adds: "It is believed that the appeal was entirely on the ground of the appellants having b of an illegal combination to raiſe the price of poſt that it was thought by the houſe of peers, that, h been for this circumſtance, the juſtices of peace w had no juriſdiction in the matter[l]."

—HORSES AND ACCOMMODATION NOT TO BE REFUSED.

PERSONS having horſes and carriages for hire, a liberty to refuſe them to any perſon willing to pay fare. In like manner, an innkeeper cannot refuſe a admiſſion into his houſe[m]. "And it is noway whether he hath a ſign before his door or not, if h his common buſineſs to entertain paſſengers[n]. He wiſe be compelled to receive a horſe, although t does not lodge in his houſe, becauſe, by keeping of he has gain; but it would be otherwiſe of a other dead thing[o]."

—EDICT *nautæ, capones, ſtabularii.*

FOR the greater ſecurity of travellers, the Roma their edict *nautæ, capones, ſtabularii*, which, with ſo tions, makes part of our law. By this edict, in and, as it has been extended by our deciſions, v

[l] July 5, 1796, William Scott againſt William Smith and others. Affirmed Jan. 8, 1798. Fac. Col.

[m] Burn, tit. Alehouſes, § 6, V. i, p. 41.

[n] "But how the officer may compel him may be a queſtion. It ſeemeth that all the officers either to cauſe ſuch ale ſuppreſſed, or elſe to p offence at the aſſizes or ſ ſo ſuch offender may b indicted." Dalt. 7. Bu

[o] Burn, ibid.

§ 7.
INNS.
—EDICT
nauta, &c.

oroughs [p]; houſeholders who take in lodgers [q]; carriers nd owners of ſtage coaches [r], are reſponſible, not only for eir own acts and thoſe of their ſervants, but for the acts the other gueſts and paſſengers [s]. They are liable for all ſes not ariſing *damno fatali*. Another peculiarity is, that e extent of the damage may be aſcertained by the ſuffering rty's oath *in litem*. Yet this oath will not be admitted, on his allegation that money was taken out of his pocket trunk while he continued in the inn, unleſs it ſhall appear proof that his clothes have been carried away, or that the nk has been unlocked, or otherwiſe broke open [t]. But carrier is not liable for money, jewels, or other article of eat value in ſmall bulk, incloſed in any parcel, unleſs its ntents be mentioned to him [u].

Damage, how aſcertained?

Oath *in litem*.

[p] Feunt. Feb. 17, 1687, Maſter of ries.
[q] Feunt. July 5, 1694. Hay.
[r] Feb. 6, 1787, Macauſland. Fac. Coll. 38.
[s] Erſk. B. iii, tit. 1, § 28.
[t] Erſk. B. iii, tit. 1, § 29.
[u] Jan. 15, 1791, Denniſton. Fac.

CHAP. VI.

Regulations for encouraging of the Planting and Preservation of Wood.

§ 1. REGULATIONS.

I. THE Scottiſh legiſlature, ſubſequent at leaſt to the reign of James I, appears to have been very ſolicitous for the improvement of the country; employing both reward and puniſhment to induce landholders to incloſe their eſtates, and adorn them with trees and foreſts. In the reign of James II, the parliament thought it[a] "ſpedefull that the king charge all his freehalders, baith ſpiritual and temporal, that in the making of their Whitſundayis ſet, they ſtatute and ordaine, that all their tennentes plant woodes and trees, and make hedges, and ſaw broome, after the faculties of their mallinges, in place convenient therefore, under ſik paine as law and unlaw of the barronne or lord ſall modifie." And, in like manner, the tenth parliament of James V, ordained "that everie man, ſpiritual and temporal, within this realme, havand ane hundreth pounde land of

[a] 1457, c. 89.

new extent be zeir, and may expend ſameikle, quhair there is na wooddes nor forreſtes, plant woodde and forreſt, and make hedges, and haning for himſelfe, extending to three aickers of land, and abone or under, as his heritage is mair or les, in places maiſt convenient: and that they cauſe everie tennent of their landes, that hes the ſame in tack or aſſedation, to plant upon their onſet zeirly, for everie marke land, ane tree. Ilk laird of ane hundreth pounde land, under the paine of ten pound, and leſſe or mair, after the rate and quantitie of their lands." § 1. REGULATIONS.

THESE enactments were ratified by the act 1661, c. 41, which farther enjoined every heritor, liferenter, wadſetter, worth 1000l. Scots a year of valued rent, to incloſe four acres of land yearly for the then enſuing ten years, and to plant the ſame with trees: and other proprietors, in like manner, more or leſs in proportion to their reſpective rents, the incloſed ground, for nineteen years, being free from all burdens and quarterings of horſe [b].

II. THE deſtroying of planting was puniſhable by a great variety of enactments, the execution of which is intruſted, by the general ſtatutes, to the juſtices of the peace [c]: and it is expreſsly declared that they are to proceed by witneſſes and oath of party; and farther, that the puniſhment to be inflicted ſhall be a *pecunial* ſum, anſwerable to the circumſtances of the offence and quality of the offenders. This was a very wiſe limitation: for, the ſtatutes referred to not only inflict the leſſer corporal puniſhments of the ſtocks, but in ſome caſes go the length of a capital puniſhment. Neither, indeed, is it very eaſy to reconcile thoſe old ſtatutes with each other. By one ſtatute, the penalty for the firſt offence was 10l. Scots to the proprietor, 20l. Scots for the ſecond, and 40l. Scots for the third, beſides damages [d]. And, in caſe the committer of the wrang be unreſponſal, he ſall for the firſt § 2. PUNISHMENTS. Statutes to be executed by the juſtices. Ancient ſtatutes. Penalties by 1579, c. 84.

[b] Parl. 1, Cha. II. [c] App. I, p. liv. [d] James II, 1579, c. 84.

§ 2. PUNISHMENTS.

fault be put in the ſtocks, priſon, or irons, eight days, on bread and water; and for the ſecond fault, fifteen days; and for the third fault, one month to lie in the ſtocks, and to be ſcourged at the end of the month." But with theſe ſeverities and inconſiſtencies juſtices of peace have no concern, they being wiſely reſtricted, as already mentioned, to a pecuniary fine; and, as muſt always be implied, impriſonment in caſe of the offender's inability to pay the ſame [e].

In caſe of inſolvency.

Death.

FARTHER, thoſe who wilfully cut and deſtroyed young trees, were to be "puniſhed to the death [f], as thieves." The act 1607, c. 3 [g], ratifies former acts, and farther enacts, "that whaſoever ſhall be found hereafter to break down his neighbours woods and park dykes, fenſes, ſtanks or cloſoures, to paſtour within the ſaid fenſes, cut trees, broome, or ſheare graſſe within the famine, ſhall be conveined and called therefore, as an breaker of the law, either before the privy councill, or any other ordinare magiſtrat within this realme, at the option of the party compleiner: and the penalty to be impoſed and taken of the contraveiners, before the ſaids ordinare inferiour judges, not to exceed the ſumme of forty pounds money of this realme. And the ſecret councell to impoſe ſik penalties againſt the contraveiners of this preſent act, as after tryell taken in the cauſe, they ſhall finde the offence to merite and deſerve. But" (i. e. without) "prejudice alwyſe of putting of all former acts of parliament made thereanent to execution, after the tenour thereof in all poynts; to the whilk this preſent act ſhall make na derogation."

THE act 1641, c. 45, prohibits the demoliſhing, down-caſting, climbing over, or any ways wronging the dikes of incloſure and planting within the ſame, under the penalty of 5l. The ſtatute 1661, c. 41, after ordaining each heritor to plant ſo many acres according to his valued rent, "for the better encouragement of heritors, and for preſerving of the

[e] See Vol. I, p. 209. [f] Parl. 11, Jas. VI, 1587, c. 83. [g] Parl. 9, Jas. VI

nting and incloſures, ordained, that whoſoever ſhall §2. PUNISHMENTS.
reak any of the ſaid trees, (not being the heritors res), ſhall pay unto the heritors or perſons wronged Encouragement to plant.
ts for every tree; or if he be not able to pay the ſaid
all be in the power of the party thereby wronged, to
m work ſix weeks, giving him meat and drink allen- Cutting trees.
nd farther, it is ordained, that whoſoever ſhall break
e hedges or dikes of the ſaid parks or incloſures, or Penalty.
l within the ſame, being a ſtranger, ſhall be holden
te a breakerdown thereof, and pay 5l. Scots for every In caſe of inſolvency.
: if he be not able to pay the ſaid 5l. Scots, to work ten
ſhe owner of the ſaid grounds, for meat and drink as Breaking hedges, &c.
And the act 1685, c. 39 [a], ordains "that no perſon
, break, or pull up any tree, or peel the bark off any Penalty.
der the penalty of 10l. Scots for each tree within
s old, and 20l. Scots for every tree above that age. Thoſe unable to pay muſt work.
ers or uſers of the timber of any tree ſo cut, broken,
d up, are declared liable to the ſame penalty, unleſs
i produce the guilty perſon who committed the miſ- 1685, c. 39.
our."

act 1661 directs proceſs to be granted at the inſtance
rty damnified; and the other ſtatutes are not expli-
the form of the action. Hence a queſtion ariſes,
it may be at the inſtance of the private party alone,
concourſe of the procurator fiſcal. Perhaps this
allowed, where the concluſion is merely *pecuniary*;
aid of the public proſecutor ought always to be taken,
uniſhment of any kind is inſiſted for.

r trees in orchards fall under the ſtatutes for the Fruit trees.
tion of planting [b]. As alſo natural woods, where the Natural woods.
: of that value to be cut down and ſold [i].

VII, parl. 1.
rran, tit. Planting, No. 2.
ſays lord Kilkerran, was thought to be imported in the letter of the 41ſt act, parl. 1, ſeſſ. 1, Cha. II, and therefore no regard was had to

§ 2. PUNISHMENTS. —BRITISH STATUTES. —1 GEO. I, c. 48.

THESE offences are puniſhed by Britiſh ſtatutes alſo.

STATUTE 1 Geo. I, c. 48, § 1, enacts, that "if any perſon ſhall maliciouſly break down, cut up, pluck up, throw down bark, deſtroy or ſpoil any timber tree . . . fruit trees or other tree . . . it ſhall be lawful . . . for any two . . . juſtices of the county . . . upon complaint . . . by any inhabitant of ſuch pariſh, or of any other, to cauſe ſuch offender . . . to be apprehended; and to hear and finally determine[k] and adjudge all and every the offence . . . aforeſaid. And if two juſtices ſhall convict any perſon . . . then ſuch juſtices . . . ſhall commit ſuch offender . . . to the houſe of correction there to continue and be kept to hard labour for three months; and where there are no houſes of correction in the county, the juſtices ſhall commit him to priſon for ſix months: and ſhall alſo order that ſuch offender be publickly whipped by the maſter of ſuch houſe of correction once every month during ſuch three months, in ſuch borough or corporation if the offence be committed therein, or in the market town where ſuch houſe of correction ſtands, or in the next market town in the county, on the market day, between the hours of eleven and twelve; and where there is no houſe of correction, the juſtices ſhall order ſuch offender to be whipped by the hangman, once every month during

Two juſtices.

Puniſhment.

Correction houſe.

Impriſonment.

Scourging.

the ſuggeſtion, that fruit trees did not ſeem to fall under the purview of the ſtatute; and that penal ſtatutes were not to be extended.

i Some oak trees, which formed part of a clump of natural wood, having been cut down, the proprietor ſued for the penalties, under the act 1685, c. 39. The judgment of the ſheriff was this: "In reſpect it appears that the trees libelled were not planted trees, but grew in a natural wood from ſtools or roots of trees that had been formerly cut, ordains the purſuer to inſtruct the value of the trees libelled, at the time of their being cut by the defender, and what value they might have risen to had they been allowed to grow to maturity." The lord ordinary refuſed a bill of advocation: but the court rather conſidering the ſtatute as protecting likewiſe natural woods, paſſed it. 3d March 1784, Buchanan against Malcolm. Fac. Coll.

k See the import of ſuch an expreſſion as to the finality of the juriſdiction, Vol. I, p. 280.

ſuch four months, on the market day, where ſuch offender ſhall be committed, or on the market day of ſome town between the hours aforeſaid." § 2. PUNISHMENTS —1 GEO. 1, c. 48.

BEFORE ſuch offender be diſcharged, he ſhall find ſureties for his good behaviour for two years.

AND if any perſon ſhall maliciouſly ſet on fire, burn, or cauſe to be burnt, any wood, underwood or coppice, he ſhall be puniſhed as a wilful fire raiſer[1]. Burning.

THOSE who ſhall in the night time, ſpoil, deſtroy, or carry away any timber tree, or pluck up, ſpoil, deſtroy, or carry away any root, ſhrub, or plant, of the value of 5s. ſterling, growing in a nurſery or other incloſed ground, ſhall be deemed guilty of felony ſo as to ſuffer tranſportation for the ſpace of ſeven years. And thoſe who wilfully are aiding, abetting, or aſſiſting, ſhall be liable to the ſame puniſhment[m]. Spoil in the night time.

AND by the 6 Geo. III, c. 48, every perſon who ſhall wilfully cut or break down bark, burn, pluck up, lop, top, crop, or otherwiſe deface, damage, ſpoil or deſtroy, or carry away any timber tree or trees, or trees likely to become timber, or any part thereof, or the lops, or tops thereof without the conſent of the owner, (or in any of his majeſty's foreſts or chaces, without the conſent of the ſurveyor . . . or his deputy, or perſons entruſted with the care thereof), and ſhall be thereof convicted on the oath of one or more credible witneſs or witneſſes, before one or more juſtices, ſhall, for the firſt offence, forfeit a ſum not exceeding 20l. ſterling... together with the charges previous to and attending ſuch conviction, to be aſcertained by ſuch juſtice on non-payment thereof, to be committed by ſuch juſtice to the common gaol, for any time not exceeding twelve months, nor leſs than ſix, or until —6 GEO. III, c. 48. Kinds of timber. Offence. One witneſs. One juſtice. Penalty. Impriſonment.

[1] § 4, 7 Anne, c. 21.

[m] 6 Geo. III, c. 36.

§ 2. PUNISHMENTS —6 GEO. III, c. 48.

the penalty or charges ſhall be paid: for the ſecond offence to forfeit not exceeding 30l. ſterling, together with the charges as aforeſaid; on non-payment, to be committed as aforeſaid for any time not exceeding eighteen months, nor leſs than twelve, or until the penalty and charges ſhall be paid. And if any perſon ſo convicted, ſhall be guilty of a like offence a third time, and ſhall be thereof convicted in like manner, he ſhall be deemed guilty of felony, and the court before whom he ſhall be tried, ſhall have authority to tranſport him for ſeven years. And all oak, beech, cheſnut, walnut, aſh, elm, cedar, fir, aſp, lime, ſycamore, and birch trees [n], ſhall be deemed timber trees, within the meaning of this act.

Tranſportation.

Kind of trees.

ACCORDING to the words of this act, any one juſtice may order a man to be tranſported. "This," ſays Dr. Burn, "muſt be a miſtake; it cannot be intended that a juſtice ſhall have power to tranſport a man. But the word *convicted* afterwards, before which he ſhall be convicted, (that is, at aſſize or ſeſſions, as it ſeemeth by the following words of the act), implies a legal trial by jury. And, therefore, the words" in like manner "ought to be omitted [o]."

Dr. Burn's obſervation, as to one juſtice having power to tranſport.

IN Scotland, for the ſame reaſon, that clauſe cannot make tranſportation a puniſhment competent to be inflicted even by the ſeſſions; which here, as we have ſeen [p], do not try offences by a jury. And that the legiſlature could intend againſt the ſpirit of our common law, and the tenor of our ancient enactments, as well as the principles of the Britiſh conſtitution, to deprive the ſubject, by implication, of the privilege of a jury trial, in the caſe of tranſportation, is not to be ſuppoſed. There is a price, at which, even the extent

Contrary to the common law of Scotland.

[n] And alſo poplar, alder, larch, maple, and hornbeam; 13 Geo. III, c. 33.

[o] Tit. Wood, Vol. iv, p. 473.

[p] Vol. I, p. 147.

y and cultivation of the country, may be purchaſed too § 21 PUNISHMENTS —6 GEO. III, c. 48.

s third ſection relates to the puniſhment of thoſe Plucking roots.
ng up, or deſtroying roots, ſhrubs, or plants, out of nurſeries, or gardens.

his caſe alſo, the trial is competent before one juſtice One juſtice.
ounty where the offence has been committed, who may
n in any ſum not exceeding 40s. ſterling with expences; Fine.
r the ſecond offence, in any ſum not exceeding 5l.; Second conviction.
if any perſon, ſo before convicted, ſhall a third time
t the like offence, and ſhall be thereof convicted, ſuch Third do.
ſo convicted ſhall, for ſuch third offence, be deemed
of felony; and the court before whom ſuch perſon
e tried, ſhall and hereby hath authority to tranſport Tranſportation.
rſon for the ſpace of ſeven years, to any of his ma-
plantations in America, in like manner as other felons
ected to be tranſported by the laws and ſtatutes of
alm." So far as this clauſe is underſtood to give
ne or more juſtices the power of inflicting ſummarily
niſhment of tranſportation, Dr. Burn's obſervation Dr. Burn's obſervation applies.
re too apply [q].

ther, the ſtatute ſays it ſhall *as felony*, which therefore re a technical meaning in the criminal law. In Scotland, no ſuch *nomen juris*. With nerely a common word, and n general, acting with a criintention. Accordingly, in the Geo. I, c. 48, the legiſlature this, made a diſtinction beingland and Scotland. The of woods in England it de- be felony; but as to Scotdrops the word felony, and deſcribes the puniſhment to be inflicted.

The Britiſh legiſlature has no doubt power to add both to the vocables and puniſhments of our criminal code; and when it does ſo profeſſedly, we muſt obey. But, in general, when we find the legiſlature uſing foreign and unknown terms, as having a fixed and eſtabliſhed meaning, which in our law they have not, the ſafer rule is to hold that it is ſpeaking not to us at all, but excluſively to that part of the empire in which its

§ 2. PUNISHMENTS. —6 GEO. III, c. 48.

AND laſtly, ſection fourth declares, that all perſons cutting or deſtroying "any kind of wood or underwood, poles, ſticks of woods, green ſtubs, or young trees, or carry or convey away the ſame, or ſhall have in his, her, or their cuſtody, any kind of wood, underwood, poles, ſticks of wood, green ſtubs, or young trees, and ſhall not give a ſatisfactory account how he, ſhe, or they, came by the ſame, and ſhall be thereof convicted before any one or more of his ſaid majeſty's juſtices of the peace, on the oath of one or more credible witneſs or witneſſes, ſhall, for the firſt offence, forfeit and pay immediately on conviction any ſum not exceeding the ſum of 40s. together with the charges previous to and attending ſuch conviction, to be aſcertained by the ſaid juſtice or juſtices who ſhall convict the offender or offenders. And if any perſon or perſons ſhall commit any of the offences aforeſaid a ſecond time, and ſhall be thereof again convicted in manner foreſaid, he, ſhe, or they, ſhall forfeit and pay any ſum not exceeding the ſum of 5l. ſterling, together with the charges previous to and attending ſuch conviction, to be aſcertained as aforeſaid. And if any perſon or perſons ſhall commit any of the offences aforeſaid a third time, that then ſuch perſon and perſons being duly convicted thereof according to law, ſhall be deemed and adjudged an incorrigible rogue or rogues, and ſhall be puniſhed as ſuch."

Deſtroying underwood, &c.

One juſtice.

One witneſs.

Penalty.

Second offence.

Third do.

Rogue.

AND it ſhall be lawful for ſuch juſtice or juſtices, unleſs the reſpective forfeitures ſhall be paid down upon conviction forthwith, where not otherwiſe directed by this act, by warrant under his or their hands and ſeals, to commit ſuch offender or offenders, for the firſt offence, to the houſe of correction for one month, to hard labour, and to be once whip-

One juſtice.

Correction houſe.

language is intelligible. Lord Swinton, accordingly, puts the query--does this ſtatute extend to Scotland? I ſee no other reaſon for the doubt, but this uſe of the word felony, and that in a ſubſequent clauſe, as we ſhall ſee the Engliſh court of king's bench alone is taken notice of: for in its enactments it ſpeaks quite generally.

here; and for the ſecond offence, where not otherwiſe ed by this act, to the houſe of correction for three is to hard labour, and to be whipped there once in one of the ſaid three months. § 2. PUNISHMENTS —6 geo. III. c. 48.

D if any perſon or perſons ſhall at any time hinder or Preventing the ſecuring any offender.
T to prevent the ſeizing or ſecuring any perſon em- in carrying away any ſuch timber or other trees, every erſon ſo hindering or attempting to prevent ſuch ſeizing ring, ſhall, for every ſuch offence, forfeit and pay 10l. One juſtice.
g to the perſon or perſons who ſhall convict ſuch of- Penalty.
; and if the ſaid ſum be not immediately paid on con-
, the perſon or perſons ſo convicted ſhall be, by the or juſtices before whom he, ſhe, or they ſhall be con-
, committed to the houſe of correction to hard labour, Correction houſe.
y time not exceeding ſix calendar months."

s directed, "that one moiety of all and every the for- Application of the penalties.
s herein before directed, to be paid in purſuance of t and not otherwiſe directed, ſhall go to the informer,
e other moiety to the perſon or perſons aggrieved."

s directed alſo, "that the conviction and convictions Certification to the quarter ſeſſions.
and every offender and offenders againſt this act, ſhall rtified by the juſtice or juſtices of the peace before the ſame ſhall be made to the next general quarter s of the peace, to be filed amongſt the records of the eſſions." The ſtatute farther directs the conviction e fairly written on parchment or paper in the form it preſcribes, or in any other form of words to the Finality of the juriſdiction.
ffect": which ſaid conviction ſhall be good and effect-

at is to ſay:
it remembered, that on the of C. D. convicted before
y of in the year of the juſtices of peace for
A. B. was on the complaint in purſuance of an act paſſed in the 6th year of the reign of his majeſty

§ 2. PUNISHMENTS —6 GEO. III, c. 48.

ual in law to all intents and purpoſes; and ſhall not b quaſhed, ſet aſide, or adjudged void and inſufficient for wa of any form or words whatſoever, nor be liable to be remo ed by *certiorari* into his majeſty's court of king's bench, bu ſhall be deemed and taken to be final to all intents and pu poſes whatſoever."

Finality.

IF ſuch deciſions of the juſtices be final in Scotland, ariſes from the general words at the cloſe of this ſectio The excluſion of the court of king's bench, could not, i ſound conſtruction, exclude the review of our ſupreme court

§ 3. STATUTORY PRESUMPTION.

III. A VIOLENT precaution has been taken for checkin ſuch depredations. A preſumption, *juris et de jure*, of gui has been introduced by two ſtatutes, the one Scottiſh [s], th other Britiſh [t].

—SCOTTISH STATUTES.

BY the Scottiſh ſtatute, it is enacted, that "all tenan and cottars ſhall preſerve and ſecure all growing wood an planting that is upon the ground they poſſeſs, that none o it ſhall be cut, broke, or pulled up by the roots, or the bar pulled off any tree, and that under the pain to be exacte by their maſters allenarly, of 10l. Scots for each tree withi ten years old, and 20l. Scots for each tree that is above th ſaid age of ten years, unleſs tha ſamen be done by warran and order of the ſaid maſter and heritor of the ground; an ordains the tenant to be liable for his wife, children, and ſe vants, or any others within his family that ſhall contraven this preſent act."

THE Scottiſh ſtatute ſubjects the tenant in the damage un leſs he diſcover the real delinquent [u]. Nay, it holds him liabl

king George III, for as the caſe may be.—Given under our hand and ſeal the day and year above written."

[s] William, parl. 1, 1686, c. 16.
[t] 1 Geo. I, c. 48, § 1.
[u] Dict. Vol. ii, tit. Planting.

ſ the damage was done by wife, bairns, or ſervants, though ithout his knowledge and againſt his will and orders [x]. § 7. STATUTORY PRESUMPTION.

UNDER the term "growing wood," ſuch trees as are not rorth preſerving for ſale are not comprehended [y].

THE Britiſh ſtatute ſubjects the whole inhabitants of the ille or village, in the neighbourhood whereof the delinuency has been committed, in pecuniary damages, unleſs e guilty perſon be diſcovered within ſix months [z]. And, —BRITISH STATUTES.

[x] Kilkerran, v. Planting, No. 2.

[y] Thus it was decided, that theſe tutes concerning planting did not ply to the caſe of a great number natural growing trees in a glen, hich had uſually been paſtured by tle, the trees not having been erved in time bygone to be cut ſale. Dict. Vol. ii, tit. Planting.

[z] If any perſon or perſons whatver, from and after the 24th day June, in the year of our Lord 1716, ll maliciouſly break down, cut up, ck up, throw down, bark, or otherſe deſtroy, deface, or ſpoil any timr tree or trees, fruit tree or trees, ny other tree or trees, the perſon perſons, body politic or corporate, at is, are, ſhall, or may be damaged the ſame, ſhall receive ſatisction and recompenſe of and from e inhabitants of the pariſh, town, mlet, vill, or place, where ſuch ee or trees ſhall be ſo maliciouſly oken down . . . where ſuch offence offences ſhall be committed in that art of Great Britain called Scotland, be recoverable and recovered by ay of ſummar action, and in the me manner and form as damages in other caſes of riot are to be recovered by the laws there, unleſs the party or parties ſo offending, ſhall, by ſuch pariſh, town, hamlet, vill, or place, be convicted of ſuch offence, within the ſpace of ſix months, from the committing ſuch offence or offences; any law, or conſtruction to the contrary in any wiſe notwithſtanding.

And be it further enacted and declared, by the authority aforeſaid, that it ſhall and may be lawful to and for any two or more juſtices of the peace of the county, riding, diviſion, ſtewardry, regality, city, town, borough or corporation, wherein any ſuch offence or offences ſhall be committed, or the juſtices in open ſeſſions, upon complaint to them made by any inhabitant of the aforeſaid pariſh, hamlet, vill, or place, or of the owner of ſuch tree or trees, or of any other, to cauſe ſuch offender or offenders to be apprehended for the treſpaſſes and offences aforeſaid, or any of them, and to hear and finally determine and adjudge all and every the offence and offences aforeſaid; and if ſuch juſtices ſhall convict any perſon or perſons

§ 3. STATUTORY EXEMPTION.

for the better diſcovery of ſuch offenders, juriſdiction is veſted in any two juſtices, to whom any of the inhabitants of the village ſhall complain; which two juſtices ſhall finally determine ſuch offence, and ſhall have power to commit ſuch offender to the correction houſe, to be there dealt with as ſpecified in the ſaid act.

of all or any the treſpaſſes or offences aforeſaid, then ſuch juſtices immediately after ſuch conviction, ſhall commit ſuch offender and offenders to the houſe of correction, there to continue and be kept to hard labour for the ſpace of three months, without bail or mainprize; and where there are no houſes of correction, in any county, riding, diviſion, ſtewardry, regality, city, town, or borough, where ſuch offender or offenders ſhall be convicted, the ſaid juſtices ſhall commit ſuch offender or offenders to ſuch priſon as is appointed for other criminals, there to continue for the ſpace of four months; and ſhall alſo order and adjudge that ſuch offender and offenders ſhall be publicly whipt by the maſter of ſuch houſe of correction once every month, during ſuch three months, in ſuch borough or corporation, if the offence be committed therein, and not otherwiſe, or in the market town where ſuch houſe of correction ſtands, or in the next market town next adjacent to ſuch houſe of correction and in each county where ſuch offence ſhall be committed, on the market day of ſuch town, between the hours of eleven and two of the clock; and in ſuch places where there is no houſe of correction, the ſaid juſtices ſhall order and adjudge that ſuch offender or offenders ſhall be publicly whipt by the hand of the common hangman or executioner once every month, during ſuch four months, on the market day of any borough or corporation where ſuch offender ſhall be committed, or on the market day of ſome town, between the hours of eleven and two of the clock.

And it is hereby further enacted, that before any ſuch offender or offenders ſhall be diſcharged, he, ſhe, and they ſhall find ſufficient ſureties for his, her, or their good behaviour for the ſpace of two years thence next enſuing; any law, cuſtom, or conſtruction to the contrary notwithſtanding.

CHAP. VII.

Of Winter-herding.

§ 1. IN GENERAL.

IN ancient times, it was cuſtomary for the cattle of the neighbouring proprietors to paſture promiſcuouſly, after a crop was off the ground. And no man was obliged to rd his cattle off other men's grounds or corn, or to be anerable for any damage they might do, unleſs during the ining-*time*, that is, during the time the corn was upon the ound. If one, therefore, wiſhed to keep his neighbour's ttle off his ground, it was neceſſary for him to "herd his ound, and turn off his neighbour's cattle, but without ranging them[a]." Nor could he "put them in poynd-ld," before the act of parliament 1686, c. 11[b], which was ſſed with the view of putting an end to this old and pre-dicial practice of promiſcuous paſturing.

II. THIS act proceeds on the narrative, of "the prejudice

[a] Stair, B. ii, tit. 3, § 67. [b] Jas. VII, parl. 1.

§ 2. ACT 1686, c. 11. Narrative of it.

and damnage which the liegis do ſuſtain in their plantin and incloſures, through the not herding of nolt, ſheep, an other beſtial, in the winter-time, whereby the young tre and hedges are eaten and deſtroyed."

Direction of the ſtatute.

IT therefore "ſtatutes and ordains, that all heritors, life renters, tenants, cottars, and other poſſeſſors of land o houſes, ſhall cauſe herd their horſes, nolt, ſheep, ſwine, and goats, the whole year, as well in winter as ſummer; and, in the night-time, ſhall cauſe keep the ſame in houſes, folds, or incloſures, ſo as they may not eat or deſtroy their neighbours ground, woods, hedges, or planting."

Puniſhment.

THE ſtatute farther certifies, "ſuch as ſhall contravene, they ſhall be liable to pay half a mark, (or about 13⅓d.), *toties quoties*, for ilk beaſt they ſhall have going upon their neighbour's ground, *by* and *attour*" (beſides) "the damage done to the graſs or planting."

Gives power to detain the cattle, Till the penalty, And expence of keeping them be paid.

THE proprietor of the ground, as already mentioned, having, previouſly to the ſtatute, no power to detain the treſpaſſing animals, it farther "declares, that it ſhall be lawful to the heritor, or poſſeſſor of the ground, to detain the ſaid beaſts until he be payed of the ſaid half mark for each beaſt found upon his ground, and of his expences in keeping the ſame; and this but" (without) "prejudice of any former acts of parliament made againſt deſtroyers of planting and incloſures."

IT was decided, that this act applies, if the cattle treſpaſs by breaking through or getting over a fence. If the ground be not ſufficiently incloſed, the cattle ought to be herded [c].

[c] 19th Nov. 1799, Loch againſt Tweedie. Tweedie being ſubjected upon this ſtatute, in a reclaiming petition pleaded the abſtract point, th

ETHER the ſtatute applies where the owner of the ng cattle keeps a herd, thus obeying the injunction latute, although the herd's negligence ſuffer the cattle tray, can ſcarcely be ſaid to be yet decided. This , among others, occurred in one caſe, where, upon le circumſtances, it was decided that the act did not

§ 2. JAS. VII. PARL. 1, 1686, c. 11.

eing purpoſely paſſed to oprietors to incloſe their did not apply to any caſe re were mutual fences and

The petition was refuſed, int was thought attended ulty.

18, 1794, Govan againſt c. Coll.

ler Govan and Thomas re tenants, each for one two adjoining incloſures, onged to different proprie- which were ſeparated from r by a hedge and ditch, fence ſufficient, at leaſt, to rſes or black cattle. Go- oſure was under tillage; ſheep were paſtured.

mer ſued the latter for the enalties, as well as dama- count of certain treſpaſſes ve been committed by the ſheep upon the purſuer's e ſum demanded in name s exceeded 13l. ſterling; e actual damages, amount- t four guineas.

ired, that during the time e defender kept two herds, ed each other in ſucceſſion, rding during the day, and luring the night; and that , though it was ſometimes otherwiſe, the one did not leave the field till the other arrived.

The ſheriff ſubjected the defender in payment of the actual damage done to the corn; but not in the penalties, "in reſpect he appeared to have kept a herd."

The defender acquieſced in this deciſion; but the purſuer brought it under the review of the court of ſeſſion by advocation, in ſo far as it refuſed him the penalties.

The lord ordinary having reported the cauſe on informations, the court was divided in opinion with regard to it.

Several judges, upon the grounds ſtated for the purſuer, thought all the defences ill founded. And of thoſe who thought the penalties could not be exacted, ſome gave as the ſole ground of their opinion, that in this caſe the defender had, *bona fide*, kept herds, and had done every thing in his power to prevent the treſpaſſes from being committed; others, that the act applied only where the cattle were detained.

The court, by a narrow majority, 20th Nov. 1793, repelled the reaſons of advocation; and, upon adviſing a reclaiming petition and anſwers, "adhered."

§ 2. JAS. VII, PARL. I, 1685, c. 11.

IN that ſame caſe, the proprietor of the ground had ted to detain the cattle when treſpaſſing. The co general, ſeemed to think that this was neceſſary, in o entitle him to the ſtatutory penalty.

CHAP. VIII.

Of the Regulation respecting mutual Inclosures.

I. "FOR the greater encouragement of all perſons who ſhall be vertuouſly inclined to ditch, incloſe, or plant their ground," it was ſtatuted and ordained, by a clauſe of the act 1661, c. 41[a], that "where incloſures fall to be upon the border of any perſon's inheritance, the next adjacent heritor ſhall be at equal pains and charges in building, ditching, and planting that dike which parteth their inheritance. And recommends to all lords, ſheriffs, and bailies of regalities, ſtewarts of ſtewartries, and juſtices of peace, bailies of burghs, and other judges whatſoever, to ſee this act put in execution; and to grant proceſs at the inſtance § 1. CH. II, P. I, 1661, c. 4.

[a] Cha. II, parl. 1. This act for the encouragement of planting, contained other regulations, for example, exempting incloſed ground from payment of ceſs, &c. for 19 years; ordering heritors of 1000l. rent to plant ſo much yearly, &c. Theſe clauſes were temporary. But the clauſe reſpecting mutual incloſures, and ſome others, were perpetual. The temporary clauſes were continued for 19 years, and the perpetual clauſes ratified generally by act James VII, parl. 1, 1685, c. 39.

§ 1. 1661, c. 4. of the parties damnified and prejudged, and to ſee them repaired."

THIS regulation is ſtill in force[b].

§ 2. WHERE IT APPLIES. II. UNDER this ſtatute, conterminous proprietors are bound, at their mutual expence, to repair and uphold ſuch fences as have been formerly built[c].

Requiſition neceſſary. IN order to have the benefit of this ſtatute, it is neceſſary to make previous requiſition to the conterminous proprietor, Requiſition. to concur in erecting the fence; otherwiſe he will not be liable in any part of the expence[d]; at leaſt no farther than he is clearly benefited[e].

[b] July 28, 1713, Dunbar againſt ſir Robert Gordon. (Forbes.) And 5th Dec. 1769, Riddell againſt the marquiſs of Tweedale. (Fac. Coll.)

[c] 20th Jan. 1758, Alexander Lockhart againſt John Scivewright.

In March 1745, Alexander Lockhart purchaſed the lands of Craighouſe from John Scivewright's father. The boundary on the eaſt, between the lands of Craighouſe and the lands of Plewlands, the property of Scivewright, is deſcribed in the diſpoſition to be a ſtone dike, "which ſtone dike, upon the eaſt ſide, is hereby declared, to be, now and in all time coming, the boundary between the ſaid lands of Plewlands and the lands of Craighouſe."

In the year 1757, this ſtone dike had become decayed; and Mr. Lockhart, with a view to incloſe that part of his eſtate, brought an action againſt Scivewright, to oblige him to contribute half the expence of repairing or rebuilding it, or of making ſuch other ſufficient fence as ſhould be found to be proper.

Pleaded in defence.—At common law, thoſe who have concurred in building, may be obliged to uphold; yet this will not apply to the caſe, where one heritor has been at the ſole expence of building, without following the rules of the act 1661; the intention of which ſtatute was only to encourage the incloſing lands, but not to provide for preſerving incloſures already made.

"The lords found the defender liable to contribute one half of the expence of upholding the march dike between the purſuer's property and his." Fac. Coll

[d] 23d Feb. 1738, Ord againſt Wright. In this caſe, on account of that omiſſion, no part of the expence was laid on the conterminous heritor.

[e] 9th Jan. 1679, Seaton.

Seaton of Gairlton purſues Seaton of Barns on this ground, that he having incloſed a park, a part of the

A PROPRIETOR is compellable to contribute equally to the § 4. WHERE IT APPLIES.
ding of the mutual fence, though the benefit he derives
n it ſhould not be preciſely equal [f]. But the benefit muſt
h ſome meaſure mutual, otherwiſe the ſame equity, that
: birth to the regulation, will prevent its application [g].

t like manner, it was determined that it does not apply

whereof is upon his ground, ad-
t to the march of Barns' ground,
part of the dike which is upon
march, ſhould have been made
y equal expence of both par-
The defender alleged, No pro-
because the defender was never
ed to concur in building of the
which he might have done by
wn ſervants, and by the land
s of his own ground, which the
ir mutile uſe of; and the act of
ment doth not ordain the half
e expences by either party, but
both parties ſhould concur,
h neceſſarily imports a requiſi-
though it be not expreſſed.
he lords found, that ſeeing requi-
was not made, that they would
ſuſtain the proceſs againſt the
der *in quantum lucratus*, by not
put to the expence in the con-
g to the building, which he
t have done by his own ſervants,
therefore would modify the ex-
es ſo much the lower." (Stair.)
Dict. Vol. iv, p. 80.
n heritor ſold a part of his eſtate,
rated from the part he reſerved
ſtone dike, which dike is declar-
n the purchaſer's diſpoſition "to
ow and in all time coming the
ndary between the lands." This
dike falling, ſome years after, into
diſrepair, the purchaſer brought an
action againſt his author, the conter-
minous heritor, to oblige him to con-
tribute half the expence of repairing
it. Urged in defence againſt this
plea, That the dike was beneficial
only to the purſuer, for the behoof
of whoſe lands alone the defender
had formerly erected it; and that it
was of no ſervice to the defender's
lands, as they were all unincloſed,
and ſet in long tacks. The court
found the defender liable to contri-
bute one half of the expence of up-
holding the dike.

[g] 15th June 1784, earl of Peter-
borough againſt Mrs. Garioch. Dict.
V. iv, p. 81.

The earl of Peterborough, pro-
prietor of an eſtate in Kincardine-
ſhire, intending to incloſe his grounds,
petitioned the ſheriff that Mrs. Ga-
rioch, a conterminous heritor, might,
in terms of 1661, c. 41, and 1685, c.
39, be found liable in half the ex-
pence of the march dike. The de-
fender ſet forth, That her property
was mountainous, barren, and of
little value, and which would not be
meliorated at all in proportion to
the expence. The court, in an advo-
cation, ſuſtained the defence.

§ 2. WHERE IT APPLIES.

to ſmall properties conſiſting of no more than five o acres each. The lands of two proprietors were div by an inconſiderable ſtripe of water, oftimes dry. one proprietor made requiſition upon this ſtatute to other, to concur with him in building a mutual fence. declined doing ſo. It was decided that the ſtatute app But it was ordained, that the ſtripe of water ſhould e "be wholly without the dike, or, if the defender ple that it run a ſpace within the dike and a ſpace without dike, that either party might have the benefit of wate thereat[h]."

If only to dry marches?

§ 3. NATURE OF THE FENCE.

III. THE ſtatute does not ſpecify the kind of inclo whether ditch, or hedge, or of dry ſtones, or built mortar, which it leaves to be regulated by the parties th ſelves; or, if they diſagree, by the judge ordinary[i].

[h] 21ſt July 1669, earl of Crawford againſt Rigg. Stair, V. i, p. 642.

[i] July 1739, Douglas againſt Penman. Kilkerran, *voce* Planting Incloſing of Ground, No. 1.

CHAP. IX.

Of the Regulation for straightening of Marches.

§ 1. IN GENERAL.

IT often happens, that the marches of conterminous proprietors are ſo crooked, and unevenly interſected ith each other, as not to admit of making a mutual fence thout an exchange of ground, which the act 1661, c. 41, d not give the proprietor, "vertuouſly inclined to incloſe his ound," any power of compelling. In order to provide for ch caſes, the ſtatute 1669, c. 17, was paſſed.

§ 2. 1669, c. 17. Juriſdiction created.

II. By this ſtatute it is enacted, that "it ſhall be leiſome him to require the next ſheriffs, or bailiffs of regalities, ewarts of ſtewartries, juſtices of peace, or other judges or- nar, to viſit the marches along which the ſaid dike or tch is to be drawn, who are hereby authorized, when the id marches are uneven, or otherways uncapable of ditch dike, to adjudge ſuch parts of the one or the other herit- 's ground, as occaſion the inconveniency, betwixt them,

Marches viſited.

[a] Chas. II, parl. 2.

§ 1. Ch. II, P. 2. 1669, c. 17. Adjudging the ground. from the one heritor in favour of the other, ſo as may be leaſt to the prejudice of either party; and the dike or ditch to be made, to be in all time thereafter the common march betwixt them, and the parts ſo adjudged reſpective from the one to the other, being eſtimate to the juſt avail, and compenſed *pro tanto*, to decern what remains uncompenſed of the price, to the party to whom the ſame is wanting. And it is hereby declared, that the parts thus adjudged *hinc inde* ſhall remain and abide with the lands or tenandries to which they are reſpective adjudged, as parts and pendicles thereof in all time coming."

Compenſation, if the land adjudged is not of equal extent.

§ 2. ENTAILED OR UNEQUAL. III. It may happen that the grounds of the parties are entailed. But that does not prevent the operation of this ſtatute, the land got in exchange being conſidered as part of the entailed eſtate, and liable to the ſame reſtrictions with the land given up[b]. If part of the exchange be a pecuniary conſideration, ſuch ſum muſt be conſidered as a capital to be laid out in purchaſing land, or otherwiſe, in terms of the entail.

§ 4. EFFECT OF EXCAMBION. IV. TRANSACTIONS of this ſort are not underſtood to make any alteration on the comparative value of either eſtate. Each proprietor is preſumed to get as much as he gives. And it is not uſual for any formal conveyances, from the one proprietor to the other, to take place. An exchange therefore, of ſmall parcels of land, for the purpoſe of ſtraightening marches, is not conſidered ſuch an alteration of circumſtances, as to afford ground for ſtriking any one off the roll of freeholders[c], even although his valuation

[b] 10th Jan. 1702, ſir John Ramſay againſt ſir James River: Fount.

[c] Wight's ſyſtem of election law, B. iii, c. 4, p. 287. "In a caſe from the county of Forfar, no leſs than 40 acres had been given off by one proprietor to his neighbour, but as he received another piece of land in exchange, it was underſtood the transaction made no variation upon

no greater than the law requires; not even although the freehold depend on the old extent[d]. § 4. EFFECT OF EXCHANGE.

extent of his valued rent." 1768, Shene againſt Graham. Ibid. But if conſiderable tracts of ground are exchanged, and mutual diſpoſitions become neceſſary, there may be a ſubſtantial alteration in their reſpective eſtates; and it ſhould ſeem that an alteration of that nature might form an objection. Ibid.

[d] Feb. 1781, Hamilton of Sundrum againſt Bogle of Shettleſtone. Wight. Ibid, p. 287.

CHAP. X.

Of the Diviſion of Lands lying Run-ridge.

§ 1. IN GENERAL.

I. "LANDS are ſaid to lie run-ridge, where the alternate ridges of a field belong to different proprietors[a]." For remedying ſo inconvenient an arrangement, the act 1695, c. 23 [b], was paſſed.

§ 2. WILL. P. 1, 1695, c. 23. Preamble.

II. THIS ſtatute proceeds on the narrative, of the "great diſadvantage ariſing to the whole ſubjects from lands lying run-rig, and that the ſame is highly prejudicial to the policy and improvement of the nation, by planting and incloſing."

Juriſdiction given.

IT was therefore ordained, "that wherever lands of different heritors lie runrig, it ſhall be leiſum to either party to apply to the ſheriffs, ſtewarts and lords of regality, or juſtices of peace of the ſeveral ſhires where the lands lie, to the effect that theſe lands may be divided according to their reſpective intereſts, who are hereby appointed and authorized for that effect, and that after due and lawful citation of

[a] Erſk. B. iii, tit. 3, § 59. [b] William, parl. 1.

arties concerned at an certain day, to be prefixed by the id judge or judges. § 2. WILL. P. 1, 1695, c. 23.

" It is always hereby declared, that the ſaid judges, in king the foreſaid diviſion, ſhall be and are hereby reſtrict- , ſo as ſpecial regard may be had to the manſion-houſes of reſpective heritors, and that there may be allowed and udged to them the reſpective parts of the diviſion, as ll be moſt commodious to their reſpective manſion-houſes l policy, and which ſhall not be applicable to the other acent heritors." Mode of proceeding.

It is alſo provided and declared, " that thir preſents ll not be extended to the burrow and incorporat acres, t that, notwithſtanding hereof, the ſame ſhall remain h the heritors to whom they do belong, as if no ſuch act been made." Incorporate acres.

III. The diviſion competent to landholders, by this ſtat- , " is not in practice confined to runrig lands, in a ſtrict ſe of the words, but is, by a liberal interpretation, ex- ded to caſes where the properties of the ſeveral heritors broke off, not by ſingle ridges, but perhaps by roods or rec[c]." § 3. HOW INTERPRETED IN PRACTICE.

A diviſion under this ſtatute has been ordered to pro- d in the caſe of ſix acres[d]; and even of no leſs than nine ntiguous acres[e]. But more lately it has been held, that is was rather carrying the remedy beyond the ſtatutory tendment; and it is now underſtood, that the largeſt antity of ground to which the act applies is four contigu- s acres[f].

[c] Erſk. B. iii, tit. 3, § 59.
[d] 13th Nov. 1755, heritors of Inerſk againſt James Milne. Fac. Coll.
[e] Marquis of Annandale, 1774.
[f] Jan. 17, 1782, Lady Gray. Fac.
L

§ 3. How interpreted.

"SMALL parcels of land ſurrounded by a greater eſtate and lying at a diſtance off from each other, but each parcel lying contiguous, and not runridge, do not fall under" this act[g].

IT is competent to feuars to ſue for a diviſion upon this ſtatute, againſt their ſuperiors[h].

[g] Interlocutor in the caſe Dec. 7, 1744, Sir John Hall againſt Aliſon Falconer. Followed as a precedent in the caſe July 14, 1780, Muriſon againſt Dryſdale. Fac. Coll.

[h] 28th Jan. 1774, Feuars of Tranent againſt York-Building company. Fac. Coll. In this caſe ſome other points were diſcuſſed.

In the neighbourhood of Tranent, there is a tract of ground of about 500 acres, partly belonging to feuars from the family of Winton, and partly to the York-Building company, as purchaſers of the forfeited eſtate of Winton, comprehending, *inter alia*, the barony and borough of barony of Tranent.

As matters ſtood, there were in all 26 feuars of Tranent, vaſſals to the York-Building company, the original number being reduced from the rights of different feus or plots having come into one perſon. Of theſe, fourteen concurred in inſtituting an action againſt the ſaid company, and the twelve reſiduary feuars, founding upon the act 1695; and, in reſpect that the purſuers lands lay runrig, or rundale, interjected with other conterminous lands belonging to the defenders, concluding that the whole ſhould be meaſured, valued, and divided, and lands allocated to each of them, contiguous and together.

The feuars, called as defenders, made no oppoſition, conſidering the meaſure to be for the general benefit; but a keen oppoſition was maintained upon the part of the York-Building company, on the following grounds.

1mo, There was an objection to the title. 2do, It was pleaded, that the ſtatute of run-ridge regards only *prædia ruſtica*, ſo conſiderable, as to be the ſubject of incloſing and planting not *kailyards* and ſmall pendicles of ground in the neighbourhood of boroughs. And, 3tio, That of eight of the feuars now purſuing a diviſion, the properties lay in detached plots, not all interjected, and which certainly, therefore, the ſtatute was not applicable. The court repelled the objection to the title of the purſuers, and to the competency of the action; and allow the diviſion to proceed. Repel the objection, that eight of the feuars have their ſeveral properties, as now poſſeſſed by them, in one plot, each by themſelves; and, therefore, cannot be tranſpoſed from one ſituation to another: And find it competent for the commiſſioner, in making the diviſion, to ſet off the ſhares of the parties on either ſide of the town of Tranent, as ſhall be moſt conducive for the general intereſt, and without regard to the place where their re-

livision of run-ridge lands, it is not neceſſary that the ſhould be made parties to the action. It is preſumed landlord will take care of the intereſt of his tenants, they ſuffer, have recourſe againſt him on the war- in their leaſes [a]. § 3. HOW IN- TERPRET- ED.

oſſeſſions were before the
igment was "adhered to,"
laiming bill and anſwers.

[a] May 15, 1792, Bruce againſt Bruce, Dict. V. iv, p. 247.

CHAP. XI.

Of the Diviſion of Commons.

§ 1, IN GENERAL.

I. A REGULATION, which has been ſtill more extenſively ſalutary to the landed intereſt and agriculture of Scotland, is that of king William's firſt parliament, "concerning the dividing of commonties." The exerciſe of this important juriſdiction is appropriated excluſively to the ſupreme court. But juſtices of peace, along with ſheriffs, ſtewards, and bailies of regality, are expreſsly authorized to perambulate and take all neceſſary evidence; ſo that the court of ſeſſion may, on their report, determine the proceſſes."

§ 2, WILL. P. 1, 1695, c. 38. Preamble.

II. THE preamble of the ſtatute mentions its object to be, "for preventing the diſputes that ariſe about commonties, and for the more eaſy and expedite deciding thereof in time coming."

Enactment.

IT was therefore ſtatuted and ordained, that all commonties, "(excepting the commonties belonging to the king and

ıl boroughs, i. e. all that belong to his majeſty in proper- § 2.
r royal boroughs in burgage), may be divided at the in- WILLIAM, PARL. 2, 1695, c. 38.
ce of any having intereſt, by ſummons raiſed againſt all —EXCEP-
ons concerned, before the lords of ſeſſion, who are here- TION.
mpowered to diſcuſs the relevancy, and to determine Royal commonty.
ı the rights and intereſts of all parties concerned, and
ılue and divide the ſame, according to the value of the Burgage tenure.
ts and intereſts of the ſeveral parties concerned, and to
t commiſſions to ſheriffs, ſtewards, baillies of regalitie, Mode of procedure.
their deputes, or juſtices of peace, or others, for per- Who may ſue?
ulating, and taking all other neceſſary probation, which
miſſion ſhall be reported to the ſaid lords, and the ſaid Juriſdiction veſted.
eſſes ultimately determined by them.

AND where moſſes ſhall happen to be in the ſaid com- If there be moſſes.
ıties, with power to the ſaid lords to divide the ſaid moſſes
ngſt the ſeveral parties having intereſt therein, in manner
ſaid.

OR, in caſe it be inſtructed to the ſaid lords that the If they cannot be divided.
moſſes cannot be conveniently divided, his majeſty, with
ent foreſaid, ſtatutes and declares, that the ſaid moſſes
l remain common, with free iſh and entry thereto whe-
divided or not.

DECLARING alſo, that the intereſt of the heritors having Rule of eſtimating the differ-
t in the ſaid commonties, ſhall be eſtimate according to ent intereſts.
valuation of their reſpective lands and properties; and
ch diviſions are appointed to be made of that part of the
ımonty that is next adjacent to each heritor's property."

II. A COMMON may be divided at the ſuit of any having § 3.
reſt; not only of a joint proprietor, but even of one per- CONSTRUCTION OF THE ACT
having merely a right of ſervitude thereon[a]. But whe-

[a] Erſk. B. iii, tit. 3, § 57. See, however, lord Kilkerran's doubt, (Dec. 129.)

§ 3. CONSTRUCTION OF THE ACT —WHO ENTITLED?

ther the ſtatute extends to lands which belong in p to one proprietor, and are only burdened with ſervit favour of neighbouring tenements, has been much diſ It is clear that it is no ſufficient ground to entitle one to a diviſion on this act of parliament, that a few definite ſervitudes of ſo many *rooms* of graſs, for example, a off. Such, neither in legal, nor in vulgar language, wi a common; for very frequent inſtances occur of a ſe of two cows' graſs, for example, on the richeſt com which was never even vulgarly called a *common*. I caſe is different where the ſervitudes are of ſuch ex to exhauſt the whole or great part of the uſe of the ſ as is often the caſe of large hills and great tracts o ground. Such are often even in the language of our called common [c]. They have occaſioned much di of opinion, and have been variouſly decided in the of ſeſſion. In one inſtance, it was decided that lay for a diviſion of a common to thoſe having ſe vitudes againſt the proprietor, (and, of courſe, *vice* although there was no common property [d]. But ſubſequent ſuit, at the inſtance of the proprietor of mon moor againſt his feuars, who had only rights o tude therein, where "the matter was argued amo lords themſelves, with more accuracy than it had b any of the former caſes," it was decided that "the was not entitled to inſiſt in a diviſion upon the act liament [e]."

A joint proprietor.

One having a right of ſervitude.

BUT this general point again occurring, and ſti much dividing the bench, lord Kilkerran reports, tha

[b] Kilk. v. Commonty, No. 5.

[c] Dirleton, v. Commonty; and ſir James Stewart's anſwers.

[d] 7th Jan. 1724, lord Kames, Vol. i, No. 42; Kilkerran, p. 126.

[e] 31ſt Dec. 1739, and 1ſt F ſir Robert Stewart of Tilli the feuars of Tilliecoultry. Commonty, No. 5.

ided a ſpecial determination of the point, but fell what of a middle way. They found that, without : to the defender's right of property, the ſurface of in queſtion might be divided between the parties, g to their ſeveral intereſts on that ſurface:" which, Kilkerran, ſeems rather a judgment on the com- than upon the ſtatute. In a later caſe, however, it n decided that a right of ſervitude over a commonty ch an intereſt as can authorize a diviſion upon the

§ 3. CONSTRUCTION OF THE ACT —WHO ENTITLED?

ſeveral proprietors be the only parties, the rule of as fixed by the laſt clauſe of the ſtatute, is accord- he valuations of the ſeveral lands and properties. diviſion of valuation muſt be made by the commiſ- f ſupply[s].

—RULES OF DIVISION.

eb. 1771, Gilbert Lawrie :, and others, *ag.* the duke n. Hamilton's Deciſions,

roceſs of diviſion of the of Reddinrig and White- ras decided that there were ent claſſes of heritors who reſt. The firſt and ſecond ere found to have a right n property correſponding ſpective lands, and were a ſhare in the diviſion o their valued rent. The conſiſting of the feuars of of Hamilton, were found a joint right of property, ht of *ſervitude* merely in heir title deeds; it being, declared, that the ſhare to to the duke of Hamilton burdened with theſe ſerv- that the feuars were to be continued in poſſeſſion, till ſuch time as ſhares ſhould be ſet off to them ſufficient to anſwer ſuch ſervitudes.

When the caſe returned to the lord ordinary, the purſuers, who compoſed this third claſs, inſiſted that, according to the interlocutor, they were entitled to have a diviſion of the commonty allotted to the duke, and ſhares ſet off to them reſpectively. In order to determine the point, his lordſhip made avizandum to the court, with theſe queſtions: 1*mo*, whether theſe feuars could oblige the duke of Hamilton to divide that ſhare of the common allocated to him, ſo as each perſon might have a ſhare appropriated correſponding to his ſervitude? and 2*do*, in caſe the feuars could force ſuch diviſion, by what rule it ought to be made?

[s] 22d Jan. 1771, duke of Queenſberry

§ 3. CONSTRUCTION OF THE ACT —RULES OF DIVISION.

WHERE the queſtion lies between the proprietors on the one part, and thoſe who claim ſervitudes on the other, Mr. Erſkine obſerves, it is more equitable to obſerve the rule laid down in the preceding clauſe, to divide the commonty according to the value of the intereſts of the ſeveral perſons concerned. Thus, in one inſtance, where the defenders had rights of ſervitude of paſturage followed by poſſeſſion, it was decided, that the rule of diviſion was, "not the valued rent; but that the commonty muſt be decided conform to the number of ſheep and beſtial in uſe to be paſtured thereon, except where any of the feuars are limited by their rights to a leſſer number of ſheep [i]." "The proprietors were formerly entitled to a ſeparate allowance, or a *præcipuum*, over and above their right of property, over and above the ſhare due to them, on account of their own or their tenants' poſſeſſion [k]."

Præcipuum.

IT has, however, been decided, that a proprietor is not entitled by virtue of his right of property to any *præcipuum* in the diviſion of the common; but that he had thereby a right to coals, mines, minerals, and other foſſils that might be under the ſame [l].

ag. Johnſon. In this caſe the court of ſeſſion ſiſted procedure till the parties obtained a diviſion of their valuation by the commiſſioners of ſupply. Sup. to Dictionary.

[h] B. iii, tit. 3, § 58.

[i] 11th Aug. 1772, Maitland againſt Tait. Fac. Coll.

[k] Erſk. B. iii, tit. 3, § 58.

[l] 21ſt Feb. 1782, ſir Robert Henderſon *ag.* captain George Macgill. The above was the interlocutor of the lord ordinary, and it was adhered to, reſerving to the proprietor to claim that part of the commonty which ſhould remain, after the reſpective ſhares had been allotted to all the parties having intereſt. Fac. Coll.

CHAP. XII.

Of the Laws concerning the Game.

§ 1. QUALIFICATION.

1. THE paſtimes of hunting and hawking, have been at all times highly eſteemed in this country, as "the only means and inſtruments to keep the hail lieges' bodies fra not becoming altogether effeminat[a]." Yet, anciently, no qualification ſeems to have been neceſſary to entitle every perſon, whether proprietor of land or not, to hunt. "It is," ſays preſident Balfour, "leaſum and permittit to *all men* to chayes hairis, foxis, and all other wild beaſts, beand without forreſtis, warrenis, parkis, or wardis[b]." It is

All qualified of old.

Preſident Balfour.

[a] Parl. 16, James VI, 1600, c. 23.

[b] Practics, p. 542. And he quotes, "Quon. Attach. c. 29, Mod. ten cur. c. 27."

No ſuch paſſage appears in the firſt authority referred to, viz. Quon. Attach.; but in ch. 52, of the Form and Manner of holding Baron courts, there is the following paſſage, which Balfour ſeems to have in view: "In the time of king Robert, na manner of waters were defended from fiſhing of ſalmon, but rivers runnand into the ſea, nor zit was not defended to *any man*, to hunt nor to chaſe the hare, and the foxe, and uther wild beaſts, without forreſts and warrenis whereſoever they are foundand."

§ 1. QUALIFICATION.

certain that, by the common law of Scotland, all men have the privilege of hunting on their own eſtates at leaſt [c].

Exceptions.

Deer.

Regalia.

King's foreſts.

IT was, therefore, an exception from this general rule, that deer, as we have ſeen, were conſidered as *regalia*, and the privilege of hunting them required a ſpecial grant from the crown [d]. In like manner, various regulations were made as to hunting in the king's foreſts [e]; our juriſprudence having never acknowledged the game, in general, to belong to the ſovereign; a maxim that, amid other corruptions, crept latterly into the feudal ſyſtem, as adopted by many neighbouring nations, though repugnant to the law and native freedom of thoſe warriors, who introduced it, originally a law of liberty, into Europe [f].

King never proprietor of the game.

[c] Aucupationes, venationes et piſcationes cum fundo tranſire nemo unquam dubitavit, ita ut qui feudum accepit, aucupari, venari, piſcari, in eo poſſit; et etiam alium externum prohibere ne aucupandi, venandi aut piſcandi cauſa ingrediatur. Craig de Feud. Lib. ii, dig. 8, § 13. With Craig agrees lord Stair, B. ii, tit. 3, § 60.

[d] But deer in incloſures are private property.

[e] Thus, in chapter 17th of the Foreſt Laws of king William, which is intitled, "of hunting within the king's foreſt," it is enacted, "1, gif anie hunts within the king's foreſt, without licence, he ſall pay 10l. 2, Gif anie free tenant, having, be vertew of his infeftment, free power to hunt within his aune land, march-and near to the king's foreſt, lets and ſuffers his dogs to runne within his awne land, and they follow the beaſt within the king's foreſt, he may follow his hounds within the king's foreſt, as far as he may caſt his lance or his doglieſch. 3, And gif it happens that the haunds or dogs [illegible] the beaſt, quhilk they followed, [illegible] in the foreſaid ſpace, that [illegible] incontinent take with him [illegible] and his haunds, without challenge [illegible] anie man. 4, And gif it ſall happen him, in following his haunds or [illegible] within the foreſt, to overpaſſ or exceide the foreſaid ſpace, he ſall pay aught kye, and ſall tak his haunds with the beaſt; 4, And quhatſoever ſall fallow his haunds or [illegible] runnand at ane beaſt, fra his proper land, within the king's foreſt, he ſall remove and lay aſide his bow and his arrows, gif he anie has, or he may bind the bow and the arrows with the bow-ſtring: and gif the beaſt ſlays the beaſt, he with his haunds and the beaſt ſall paſs away quite and free, but (without) any challenge of the king, or lord of that foreſt."

[f] Sir William Blackſtone remarks

earlieſt notice that appears in our ſtatute-book, of inction of perſons as entitled or not entitled to in- n this favourite amuſement, is the narrative of the o, c. 23 [g]; which obſerves, that, by the "common ude of all countries, ſpecial prohibition is made to all perſons to ſlay wyld foule, hair or veniſon, except by their revenues may beare the charges and bur- f the halkes, hounds and dogs requiſit in ſik paſ-

§ 1. QUALIFICATION.

1600, c. 23.

First mention of privileged perſons.

no alteration in the common law of Scotland was y this ſtatute; which contained only ſome general ons with regard to the manner and the times where- ould be lawful to kill game. But not many years er, it was ordained by the ſtatute 1621, c. 31 [h], no man hunt nor haulk at any time hereafter, who t a ploughgate of land in heritage, under the pain of

Heritage means land.

It is not the ſuperiority, but the property, (whether the crown or of a ſubject ſuperior), that gives this

gland, "upon the Norman a new doctrine took place; ght of purſuing and taking of chaſe or venery, and ſuch als as were accounted game, held to belong to the king, h only as were authoriſed ." This doctrine, however, annotator controverts with ty, obſerving, that "it is our kings, prior to the *carta* claimed and exerciſed the re of making foreſts, wher- pleaſed over the grounds bjects . . . But, beyond the f theſe privileged places, e king nor any of his grant- ees claimed a property in the game." (Chriſtian's Blackſtone, B. ii, p. 419, note 10.)

In France, prior to an ordinance of Charles VI, in the year 1366, nearly 300 years after the invaſion of England by the Normans, the privilege of hunting was common to all, excepting "dans certain lieux et avec cette différence, qu'ils ne peuvoient ſe ſervir d'engins ni chaſſer a la groſs Bête, ce qui n'étoit pas permis qu'aux gentilshommes." (Pothier, Droit Civil, &c. Tom. iv, p. 356.)

[g] James VI, parl.

[h] James VI, parl. 23.

§ 1. QUALIFICATION.

THIS very moderate qualification was ſo far a limitation of the right of hunting, previouſly common to all. In France, the right of hunting was underſtood to belong to the ſovereign, other perſons having that right only in conſequence of his permiſſion. Hence it is, ſays Pothier, "that in the different ordinances concerning hunting, the king always uſes the term *we permit* [i]." In Scotland, no ſuch right was ever ſuppoſed to belong to the crown: our enactment, therefore, ſpeaks *prohibitively*.

THIS ſtatute was ratified by the act 1685, c. 20 [k]; and,

i Droit Civil, &c. Ibid. p. 357.

k James VI, parl. 4. Amid ſome ſevere regulations, this act of James "prohibited and diſcharged all perſons to have or uſe ſetting dogs, unleſs he be an heritor of 1000l. of valued rent, and have expreſs licence of the maſters of our game within their ſeveral bounds, under the pain of 500 merks, *toties quoties*, in caſe of failzie; and we do hereby diſcharge all common fowlers and ſhooters of fowl, or any perſons, except they be domeſtic ſervants to noblemen or gentlemen who are heritors of 1000l. Scots of valued rent, to have or make uſe of ſetting dogs or fowling pieces, under the pain of eſcheat of ſuch dogs or guns, and impriſonment of their perſons for the ſpace of 6 weeks, *toties quoties*." Under this ſtatute, the juſtices of peace having given judgment againſt a proprietor of more than a plowgate of land, but who had not 1000l. of valued rent, he appealed to the circuit court of juſticiary, at Edinburgh, which decided, "That, by the common law of Scotland, all men have right and privilege of the game on their own eſtates or property, that by the act 1621 this right and privilege, or qualification, was confined to perſons who had a ploughgate of land or more of property; that the act 1685 ratified and confirmed the general rule laid down in the ſaid act 1621, but introduced a new regulation reſpecting the particular mode of killing with fowling pieces and ſetting dogs, under an exception to thoſe poſſeſſed of 1000l. Scots of valuation, and having licence from the maſters of the game: that no evidence had been laid before the court of the ſaid regulation and exemption ever having been in obſervance ſince the Union, and that they are now in deſuetude; that the appellant having more than a ploughgate of land in property had a right, and was qualified by the law of Scotland to hunt, ſubject to all the regulation of the game: that he was not liable to the fines impoſed by the 13th of his preſent majeſty; therefore they reverſe the decree of the juſtices of peace appealed from; but, in reſpect of the circumſtances of the caſe, find no expences due."

5

his day, conſtitutes the ſole qualification in this country: § 2. QUALIFICATION.
: Scottiſh game-laws thus not only happily eſcape judge
kſtone's ſevere remark, that, in England, there is "fifty
s the property required to enable a man to kill a par-
ge, as to vote for a knight of the ſhire[1];" but, more-
, in the general ſpirit of their regulations on this ſubject,
ate leſs, indeed, from Roman juriſprudence and the law
ature, than almoſt any other code of feudal Europe.

HE *criterion* ſelected divides not the nation invidiouſly
two claſſes; the rich and the poor, the noble and the
ble. Neither the ampleſt profeſſional income, nor the
ſt fortune in money, in urban tenements, or even in
able ſecurities, nor the moſt valuable leaſe of the longeſt
rance, on the one hand, nor rank, title, or pedigree, on
ther, affords a qualification for killing game. In this par-
ar the firſt peer of the realm and his children ſtand on
ſame footing with the meaneſt plebeian; ſo abhorrent
ever been the tenor of Scottiſh legiſlation from that ariſ-
tical ſpirit by which the game-laws (as frequently it is
have been almoſt everywhere dictated, and particularly
onarchical France; where nobility was almoſt exclu- In France.
y the title for enjoying the pleaſures of the chace. A
n not noble[2], (*un roturier*), was not, indeed, prohib-

l. iv, p. 174. The qualifica-
in England is, *1ſt*, an eſtate,
er freehold or copyhold, of
per annum: *2d*, a leaſehold
9 years of 150l. per annum:
ing the ſon and heir apparent
a eſquire, or other perſon of
er degree: *4th*, being the owner
per of a foreſt, park, chaſe, or
n.

peaking of the *ordonnance* 1669,
18, M. Pothier ſays, "elle la
indiſtinctement à tous les ro-
turiers et non nobles, de quelque état
et qualité qu'ils ſoient, ſauf à ceux,
qui ſont proprietaires de fiefs, leſ-
quels, en cette qualité, ont droit de
chaſſe dant tout l'etendre de leurs
fiefs." Tom. iv, p. 377. The words
of the *ordonnance* are, "marchands,
artiſans, bourgeois et habitans des
villes, bourgs, paroiſſes, villages et
hameaux, payſans et roturiers de
quelque, &c." *Roturier* properly ſig-
nifies one who holds by an ignoble
or ſoccage tenure.

§ 1. QUALIFICATION.

ited from hunting on ſuch property of his own as he feudally (*en fief*); but he could neither hunt on any perſon's eſtate, though he had the permiſſion of the prietor [n], nor even on his own allodial property [o]: wh a nobleman, (*un gentilhomme*), could hunt not only o own ground, but on that of any other perſon who gav liberty [p].

Engliſh law.

BETWEEN theſe two ſyſtems, our Engliſh neighbour pear to have ſteered their courſe pretty equally: With they agree, in part; but, entirely, with neither: Ll they confine the privilege to landed property [q]; and it, in general, to rank or title. Yet, like the French, a far regard gentility, as to allow the privilege to eldeſt and heirs apparent of eſquires, or of perſons of ſu degree. In England, fathers, thus, by virtue of their communicate to their offspring rights not belonging to t ſelves. For this peculiarity an Engliſh judge apologiz obſerving, that "the game laws are to be conſidered

[n] Les roturiers etant par leur qualité de roturſers, d'une condition à laquelle la chaſſe eſt defendue, peuvent être empêchés de chaſſer, même ſur les terres du ſeigneur de fief qui leur en auroit accordé la permiſſion. (Pothier, Tom. iv, p. 357.)

[o] *En franc aleu*, that is, held by no feudal tenure.

[p] Pothier, ibid. 359.

[q] The ſtatute 1 James I, c. 27, § 3, required either an eſtate of 10l. a-year, or 200l. in money. The ſtatute 13 Cha. II, c. 25, repealed the perſonal qualification, leaving no other but land: So, too, the earlieſt of the French ordinances touching the game, that of Charles VI, in the ye while it abſolutely forbids all not noble either to hunt, or for that purpoſe dogs, *furets*, &c. ſpecially excepts *bourgeois de leur poſſeſſions et rentes*, c'eſt ſays Pothier, *ceux qui n'exercent art mechanique ni profeſſion* (Tom. iv, p. 356); which was reſerved entire by Prince Henry IV, but afterwards ab and the right, as already mo limited to noblemen; a progr natural in France; but ver the reverſe in England, whe merce and the monied intere daily growing in importance.

tive rules, rather than as founded on reaſon; therefore, it ſafer to adopt what they have actually ſaid, than to ſup- ſe what they meant to ſay [r]." § 1. QUALIFI- CATION.

THERE is required one general qualification merely, with- t any minute diſtinctions as to the kinds of game or the anner of killing it, or whether the qualified perſon kills it nſelf or by a gamekeeper, or whether the latter hunts in s maſter's preſence or abſence; while none of the lieges : forbid the keeping either of dogs or guns, but the il- al uſe only: To this moderation in our ſyſtem of game rs, we owe our eſcape from many teaſing and trouble- ne queſtions with which the reports of our neighbours ound [s]. The ſame qualifica- tion for all game, and all modes of hunting.

IN Scotland, then, it is only ſuch proprietors as have a

Judge Aſhurſt, in the caſe Jones mart, M. 26, Geo. III, 1. v. 44.

In England, any perſon not qua- d is puniſhable "who ſhall keep e any grey hounds, ſetting dogs, , lurchers, tunnels, or any other ine to kill and deſtroy the game, ſhall be thereof convicted."

The expreſſion of the previous ſtat- 23 Cha. II, c. 25, is ſtill more eral. By it an unqualified perſon not allowed to have or keep for elf, or any other perſon, any s, bows, greyhounds, ſetting dogs, ts, coney dogs, lurchers, hays, lowbels, harepipes, gins, ſnares, her engines for the taking and g of game." Lord Macles- , who was a member of the ament which paſſed this, is re- d to have ſaid, that he objected to the inſertion of the word gun in the latter act, becauſe it might be attended with great inconvenience. (Andr. 255, 2 ſeſſ. c. 204, ſtr. 1098. Burn, tit. Game. § 4, p. 397.) Accordingly it uſes the general expreſſion engines. Hence this diſtinction obtains in practice; in the caſe of a gun, or other equivocal engine that may be uſed for other purpoſes than the killing of game, the evidence muſt be at leaſt generally, that it was kept for the illegal purpoſe; whereas, in the caſe of lurchers, harepipes, and ſuch like, which are peculiarly fitted or diſpoſed for killing game, it is incumbent on the defendant himſelf to prove that he kept them for other purpoſes, as that it was a favourite dog, houſe dog, &c. &c. Burn, ibid.

§ 1. QUALIFICATION. plowgate of land, and those who have regular depu from them as their game-keepers, that are qualified t game.

—PENALTY. THE penalty is 100l. Scots by the statute 1621, c which "ordainis his majesty to have the one half o penalty of the contravenors of this present act, and the tor to have the other half of the said penalty."

—JURISDICTION OF JUSTICES. THE jurisdiction of the justices, in prosecutions upo act, has been always acknowledged and admitted in tice, and seems to fall under the express words of the eral statutes, empowering them to punish "the users o lawful games with lying or setting dogs[a]." This pe the justices have no legal power to mitigate. The act tains no limitation as to the time within which the acti to be brought.

British statutes. BUT British statutes have gone still farther; maki punishable for unqualified persons even to have gam their possession, without first obtaining the leave of a q fied person. By the 13th of the king, c. 54, § 3, it is vided, "that every person whatsoever, not qualified game in Scotland, who shall have *in his or her custo carry at any time of the year, upon any pretence whats* any hares, patridges, pheasants, muirfowl, tarmargans, h fowl, snipes, or quails, without the leave or order of a son qualified to kill game in Scotland, for carrying hares or other game, or for having the same in his or custody, shall, for the first offence, forfeit and pay the of 20s. sterling; and for the second, and every other f quent offence, the sum of 40s. sterling; and, in case of paying the sum decreed within the space of 10 days,

Must not have game in their possession.

Offence described.

Penalty.

Second offence.

[a] App. I, pages xviii, xxxvi, liv.

conviction by a final judgment, ſhall ſuffer impriſonment for ſix weeks for the firſt offence, and for three months for the ſecond, and every other ſubſequent offence [a]." § 1. QUALIFICATION.

IT is farther enacted [b], "that all offences againſt this act ſhall and may be inquired into and determined, either by the oath or oaths of one or two credible witneſs or witneſſes, or by the confeſſion or oaths of the parties accuſed, before any two or more of his majeſty's juſtices of the peace, or before the ſheriff or ſtewart depute or ſubſtitute of the county where the offence ſhall be committed, or where the offender ſhall be found; and that all proſecutions for offences againſt this act ſhall be carried on, either at the inſtance of the fiſcal of the court in which the proſecution is brought, or of any other perſon who will inform or complain." 13 G. III. c. 54. Proof. One witneſs. Two juſtices. Sheriff or ſtewart. Proſecutor.

IF any perſon convicted of any of the offences againſt this act, ſhall not pay the penalty decreed againſt him within 10 days, the juſtices, &c. may grant warrant for levying the ſame by diſtreſs and ſale, returning the overplus to the owner; or may grant warrant for committing the offender to gaol for the time ſpecified in this act, as ſatisfaction for the penalty incurred, or until payment; and in caſe a warrant for levying by diſtreſs and ſale ſhall be firſt applied for and obtained, and the penalty ſhall not be recovered, the juſtices, &c. who granted the warrant, upon its being certified to them by the officer executing the warrant, either that he has been able to recover no part of the penalty, or that a certain part ſtill remains unrecovered, to grant warrant for committing the offender to gaol as aforeſaid [c]. One moiety of the penalties ſhall be paid to the proſecutor, and the other to the poor of the pariſh, or to the repairing the high-roads Puniſhment. Application of the penalty.

[a] § 13. [b] § 8. [c] § 9.

§ 1. QUALIFICATION. —13 GEO. III, c. 54.

within the parish where the offence shall be committed, the justices, &c. shall direct [c].

Review. Appeal.

ANY person aggrieved by any decree of the justices, may complain to the next circuit-court of justiciary, where there are no circuit-courts to the court of justiciary at Edinburgh, by entering an appeal in open court, at the time of pronouncing such decree, or at any time thereafter within ten days, by lodging the same in the hands of the clerk, and serving the adverse party with a duplicate thereof personally, or at his dwelling-house, or his procurator or agent in the cause; and such service shall be sufficient for summons to oblige the first court of justiciary held at Edinburgh at least fifteen days after service; and the decree of either of said judges shall be final, and conclusive to the parties [d].

Appellant must find caution.

WHEN an appeal is taken, the appellant, at the time of entering it, shall lodge with the clerk of court from which the appeal is taken, a bond with a sufficient cautioner for paying the sums contained in the decree appealed against, and for paying costs; and the clerk shall be answerable for the sufficiency of the cautioner [e]. If any circuit-court shall, on hearing such appeal, find difficulty to arise, the court may certify the appeal, together with the reasons of the difficulty, and the proceedings thereupon, to the court of justiciary, which is to proceed in and determine the same [f].

Certifying the appeal.

Within six months.

NO penalty shall be recovered, unless the prosecution commenced within six months after the offence committed.

Violated with impunity.

IT is unnecessary to remark, that an enactment going so much to an extreme as this, carries its own antidote along with it. Each season it is notoriously transgressed, without challenge or complaint. The first magistrates, the most

[c] § 10. [d] § 11. [e] § 12. [f] § 13. [g] § 14.

opulent merchants, and the higheſt born gentlemen of the realm, who have no landed property, ſeem unconſcious that they daily incur the guilt of tranſgreſſing the public law, and are liable to the ſame pains and penalties with common poachers, when they uſe game without firſt obtaining any other conſent than that of the poultryman, to whom they pay an adequate price. To be conſiſtent, this ſtatute, like the act 1601, c. 23, ought to have prohibited the buying of game altogether; whereas, on the contrary, it (as well as ſeveral other enactments) ſanctions this traffic[b], prohibiting the ſelling and buying game at certain periods of the year, and of courſe tacitly permitting ſuch buying and ſelling, at other ſeaſons, not prohibited. Either, then, ſuch *bona fide* purchaſe is to be conſidered as preſumption of that conſent which the ſtatute requires to be firſt obtained, or it is not. On the one ſuppoſition, the conſent required dwindles into nothing at all; and it muſt, in that caſe, be admitted, that the ſtatute adopted the very reverſe of the rule *fortiter re, ſuaviter modo*, uſing very ſtrong and terrific language to enforce a very harmleſs and inſignificant regulation: On the other ſuppoſition, it is more exceptionable ſtill. It neither is, nor can be, enforced: It is openly and hourly violated, without ſcruple or compunction on the one hand, or challenge on the other. And can the worthleſs part of the community be taught a worſe leſſon, or one that tends more to harden them in their vicious courſes, than by framing laws, which the better part of the community do not ſcruple to tranſgreſs, and are winked at in ſo doing[c]?

§ I. QUALIFICATION. —13 G. III, c. 54.

Game openly purchaſed by the moſt reſpectable part of the community.

Sanctions buying game.

[b] See alſo 1707, c. 13.

[c] One proſecution took place under the ſtat. 24 Geo. II, (repealed by the 13th Geo. III,) which contained the ſame prohibition.

The procurator fiſcal brought an action before the ſheriff againſt certain vintners. The ſheriff having impoſed fines on them, they appealed to the court of juſticiary, which diſmiſſed the appeal. Thereafter another proſecution was brought againſt the ſame parties, and a ſimilar deciſion being again pronounced by the ſheriff, was in like manner appealed from, and a very elaborate argument

§ 1. QUALIFICATION.

Engliſh qualification, its effect here,

And *vice verſa*.

Two queſtions here occur, firſt, Is one who is qualified to ſhoot in England thereby qualified to ſhoot here alſo? and *vice verſa*? Secondly, Does a plowgate of land, (our Scottiſh qualification), if ſituated in England, qualify its proprietor to hunt in this country? and *vice verſa*, viz. Is a Scottiſh gentleman, poſſeſſing an eſtate in Scotland of ſuch an extent, as, had it been ſituated in England, conſtitutes a game qualification, qualified to hunt in England? Theſe queſtions have not yet been decided in either kingdom[a]. A clauſe of the articles of Union enacted, that there ſhall be a communication of all privileges, except where it is expreſsly provided to the contrary. It would ſeem to follow from this, that one, who is qualified to kill game in one part of the kingdom, cannot be puniſhable in the other, as a poacher.

in writing given in to the court of juſticiary, to which the procurator fiſcal not giving in anſwers, the proceſs was dropt. See Maclaurin's criminal caſes, No. 85.

[a] But a point, ſomething ſimilar to the latter of theſe queſtions, occurred in a caſe which occaſioned a great deal of diſcuſſion in the court of king's bench. Under the acts 5 and 9 Anne, an action to recover a penalty for killing game without being qualified was brought againſt a perſon, who pleaded, that, having a *diploma* as *doctor of phyſic* from the univerſity of St. Andrews, he was of equal rank, and equally qualified to hunt, with thoſe who had obtained degrees from either of the Engliſh univerſities. Lord Mansfield ſaid, "he had no doubt that all privilges granted by the ſtatutes to the two univerſities were confined to our own, and did not extend to Scotland, or other foreign univerſities, which were governed by their own particular laws and cuſtoms.... There is not a colour for ſaying, that the defendant is qualified by the act of union; it is true, that by the 4th article of that act, the Scotch have the ſame general privileges as the Engliſh, but then they muſt have the ſame qualifications, otherwiſe they come not within the ſame deſcription, for the general article which declares, there ſhall be a communication of all privileges, can only mean ſuch as are of a general nature: a burgeſs of London is endued with certain privileges, to which a burgeſs of Edinburgh has no claim; ſo in every caſe where a privilege is of a qualified nature, it muſt be underſtood with that qualification; a doctor of the Engliſh univerſities may become a member of the college of phyſicians, may plead in doctors commons, and has various

II. Even qualified perſons cannot ſhoot without obtaining a ſtamped certificate. By the ſtatute 25 Geo. III, c. 50, certain ſtamp duties are laid on all certificates to be annually iſſued to perſons in Great Britain uſing any dog, gun, net, or other engine for the taking or deſtruction of game; and it is thereby enacted, "that, from and after the firſt day of July 1785, if any perſon or perſons ſhall uſe any greyhound, hound, pointer, ſetting dog, ſpaniel, or other dog, or any gun, net, or other engine for the taking or deſtruction of any hare, pheaſant, partridge, heath fowl, commonly called black game; or grouſe, commonly called red game, or any other game whatſoever, without having obtained ſuch certificate in ſuch manner as is directed by the ſaid ſtatute, every ſuch perſon or perſons ſhall forfeit and pay the ſum of 20l.; to be recovered and applied as herein after mentioned;" and the mode of recovery and application of the above and other penalties impoſed by ſaid ſtatute, with the form of conviction to be obſerved by juſtices of peace, are laid down by § 21, 16, and intervening ſections. And it is thereby farther enacted, that no certificate, obtained under any deputation or appointment of a gamekeeper, ſhall be pleaded or given

§ 2. STAMPED CERTIFICATE.

Deſcription of the game.

her privileges from which a Scotch ſhor, as ſuch, is excluded; the qua-cation, therefore, muſt be from ford or Cambridge. In like man-r, the ſtatutes allowing men of tain degrees to have certain diſ-nſations for holding two livings, ceſſarily refer to ſuch degrees only are obtained in an Engliſh univer-y, for the church of Scotland is dif-ct from ours, and admits not of e ſame rules; therefore whatever ak the defendant may hold by urteſy, he is not in point of law to conſidered as a doctor to this pur-ſe." Juſtice Willes delivered an poſite opinion: "It is objected, that a perſon who has not taken his degree in England is not to be conſidered in the light of a perſon qualified by the ſame means as thoſe are; but this objection is in my mind done away by the 4th article of the union, which enacts, 'that there ſhall be a communication of all privileges, except where it is expreſsly provided to the contrary:' As to their being excluded by the college of phyſicians, that is merely the reſult of a local inſtitution." But the point could not be decided, the court being of opinion, that even Engliſh doctors themſelves were not qualified, though their eldeſt ſons were. Burn, t. Game.

§ 2. STAMPED CERTIFICATE

in evidence in any caſe whatever, where the perſ have uſed any dog, gun, or other engine for the t game, beyond the limits of the lands in reſpect o ſuch deputation was given[a].

Limitation of the time.

THE ſtatute 26th of the preſent reign, c. 82, li time for proſecuting for penalties before the juſtices to ſix months after the offence is committed; and, to obviate any doubts which might ariſe as to the i the former ſtatute in certain particulars, enacts, that and may be lawful for ſuch juſtice or juſtices of t as aforeſaid, before whom any ſuch offender ſhall One juſtice. victed of any offence againſt the ſaid act of the la of parliament, to levy any pecuniary penalties and fe adjudged by virtue of the ſaid act, in ſuch man therein directed; and that where ſufficient goods offender cannot be found to anſwer the penalty, Penalty, application of. ſame ſhall remain unpaid, to commit ſuch offende common gaol or houſe of correction, there to remai ſpace of three calendar months, unleſs ſuch penalty ſooner paid and ſatisfied, and no longer; any thin ſaid act contained to hereof notwithſtanding."

—44 G. III, c. 98.

BUT, in lieu of former duties, (unleſs as to an penalties incurred before the 10th of October 18 was introduced by the ſtatute 44 Geo. III, c. 98, a duty of 3l. 3s. on every certificate for killing game in the caſe of a menial ſervant taking out a certific Gamekeepers. any deputation as gamekeeper, in which caſe the only 1l. 1s. ſterling: to which new duties, it is that all proviſions, penalties, matters and things i acts, not expreſsly altered, ſhall extend.

Public proſecutor.

THIS laſt ſtatute, however, introduced a very

[a] § 17

mation, declaring, that from the tenth day of October § 2.
04, no action for fines, penalties, or forfeitures, shall be STAMPED CERTIFICATE.
mmenced, but in name of his majesty's advocate, the soli- —31 GEO. III, c. 21.
or, or some other officer of the stamp duties; and that
m the passing of the said act, (28th July 1804), "all
s, penalties, and forfeitures heretofore imposed . . . by Penalties, application of.
acts relating to the duties on vellum, parchment, or
er, or this act, shall go . . . to the use of his majesty, his
rs and successors."

UNDER the above reservation, however, the action is still Appeal.
ppetent, at the instance of the public prosecutor, be-
e the justices; and any person aggrieved by their judg-
nt, may, on giving security for the value of the pen-
y, with costs, appeal to the quarter sessions, who are
powered to summon and examine witnesses upon oath,
d finally determine the same. And, in case the judgment
the justice be affirmed, it is lawful to the justices to make Finality of the sessions.
person pay the expence occasioned by such appeal, as to
mselves shall seem meet[e]. Persons summoned as wit- Witnesses.
sses, and not appearing, may be fined by the justice or jus-
es in the sum of 10l. sterling[f]. The pecuniary penalties Penalty.
der these statutes may likewise be recovered in the courts
session, justiciary, or exchequer, at the instance of the
blic prosecutor, "by action of debt, bill, plaint, or inform-
on, wherein no essoign, protection, privilege, wager of
w, or more than one imparlance shall be allowed[g]. These Stamped certificate gives no qualification to kill game.
ese essoigns, imparlances, &c. are unknown in our law,
d nowise adapted to our practice. The taking out of a
ence does not entitle unqualified persons to shoot.

THERE is a penalty of 5l. sterling against every officer of MUTINY ACTS.
he army, who, without leave of the lord of the manor, shall

[e] 25 Geo. III, c. 50, § 22.
[f] Ibid, § 23.
[g] 25 Geo. III, c. 50, § 22.

§ 2. STAMPED CERTIFICATE.

take or deſtroy any hare, coney, pheaſant, partridge, pi or any other ſort of fowl, poultry, or fiſh, or her maj game, within the kingdom of Great Britain; to be reco by complaint before any juſtice of the peace, and the n to be diſtributed among the poor of the place where offence ſhall be committed. If the offence be comm by any ſoldier, the commanding officer upon the place forfeit the ſum of 20s.; and if upon conviction, an mand of the reſpective penalties, made by the conſtal overſeers of the poor, the officer ſhall not, within two pay the ſame, he ſhall forfeit his commiſſion [h].

§ 3. REGULATIONS.

III. BESIDES, there were farther regulations for ſecu particular ſorts of game, or for preventing the killing in an improper manner, or at improper times.

—HARES. Killing in time of ſnow.

THUS, the killing hares in time of ſnow was forbi under the pain of 6s. 8 pennies Scots [i]; which offen well as that of killing rabbits in ſnow, was further m point of dittay (or criminal proſecution [k]). By the act c. 32, all perſons were prohibited from killing hares in under the penalty of 100l. Scots, *toties quoties*, the on to the king, and the other half to the informer.

Shooting.

LASTLY, the ſtatute 1707, c. 13, ordained, that no p whatever ſhoot hares, under the penalty of 20l. Scots, *quoties*, the half to the diſcoverer, the other half to be diſpoſal of the judge. It was lately decided, that this ute is in force, and that it is competent to prove the plaint by a reference to the defender's oath [l].

[h] 7 Anne 3; 10 Anne 9; 12 Anne 11; 12 Anne, parl. 5, ſeſſ. 1, 3, is continued in every one of the acts for puniſhing mutiny and deſertion.

[i] Stat. Rob. III, c. 10.

[k] 1457, c. 88.

[l] 27th June 1787, the pa fiſcal of the county of Ed againſt David Wilſon. Fac.

§ 3. REGULATIONS — DEER.

By act 1424, c. 36, the juſtice-clerk is ordained to enquire of ſtalkers that ſlay deer, and of halders and maintainers of them, and any ſtalker convicted of ſuch ſlaughter is to pay to the king 40s. Scots, and the halders and maintainers of them are to pay 10l. Scots. By act 1474, c. 60, no perſon is to kill deer in time of ſtorm or ſnow, or to kill any of their kids under a year old, under the penalty of 10l. Scots. The acts 1621, c. 32, and 1685, c. 20, augment this penalty of 10l. Scots for killing deer in time of ſnow to 100l. Scots, *toties quoties*, the one half to the king, and the other half to the informer. By act 1551, c. 9, thoſe who ſhoot with guns at deer, roe, or other wild beaſts, or wild fowl, are to be puniſhed with death, and confiſcation of moveables. By act 1555, c. 58, fowlers, who lie in wait with nets, are to be puniſhed in the ſame manner as killers of deer are by former ſtatutes. By act 1567, c. 16, ſhooting at doe, roe, hart, hind, hare, rabbit, pigeon[m], heron, or water fowl, with culverin, croſs-bow, or hand-bow, is prohibited under the penalty of forfeiture of moveables. This act was confirmed, with a variation of the puniſhment, by 1581[n], c. 123, and 1587, c. 59, by which laſt act the ſlayers and ſhooters of hart, hind, roe, deer, hares, cunnings, and other beaſts, are to incur the puniſhment of theft. The act 1594, c. 214,

Killing in time of ſnow.

Shooting.

Nets.

Water fowl.

Hares.

Rabbits.

[m] Lord Bankton, then, has overlooked theſe three acts, when he ſays he finds no law againſt ſhooting pigeons going at large. In practice, it is conſidered as a puniſhable offence. See in Vol. I, p. 107, a caſe relative to this ſubject, in 1797; and ſeveral years previous thereto, a judgment of the ſheriff of Ayrſhire, finding a perſon liable in damages for ſhooting pigeons, was affirmed by the ſecond ordinary, whoſe judgment was not acquieſced in. Laird of Fairley againſt Campbell of Newfield.

With regard to the ſhooting of pigeons: By the law of England, if the pigeons come upon my land, and I kill them, the owner has no action againſt me, though I may be liable to the ſtatutes which make it penal to deſtroy them; Cro. Ja. 492. It may alſo be obſerved here, that doves in a dove-houſe, young and old, go to the heir, and not to the executor. Coke 1. Inſt. 8.

[n] James VI.

§ 3. REGULATIONS —DEER, &c.

ordains, that none kill deer, or any kind of wild fo ſnow, nor at any other time, with guns and girns, the penalty of 100l. Scots. By act 1597, c. 270, t againſt the killing of deer, roe, hares, wild fowl, and p with hagbuts, hand-guns, croſs-bows, and piſtols, taking them with girns and nets, are ratified; and, i tion to them, it is enacted, that it ſhall be lawful for ſheriff, ſtewart, bailie, and baron, each within hi bounds, to deſtroy dogs which fowlers make uſe of f ing wild fowl, and to take and apprehend the fowlers ſelves, and put them in the ſtocks for the ſpace of 48

—BUYING.

as oft as they are apprehended. In order that the may be the better preſerved, the act 1600, c. 23, pr the buying or ſelling of red, or fallow-deer, roe, hare ridge, moor-fowl, or other wild fowl, that is in uſe taken by hawks, under the penalty of 100l. Scots. Th penalty is, by this act, to be inflicted on thoſe who k ſaid wild fowl, or wild beaſts, by girn, net, or hagbu act 1621, c. 30, all perſons are prohibited from buy ſelling pouts, partridges, moor-fowl, black cocks, gra tarmagans, quails, or caperkailies, under the penalty o Scots. And by 1685, c. 20, all buying or ſelling of roes, hares, moor-fowl, tarmagans, heath-fowl, partrid quails, is prohibited for the ſpace of ſeven years, und penalties contained in act 23, parl. 1600. Likewi ſtroying the neſts or eggs of wild fowl, or killing th moalting time, when they cannot fly, is prohibited the penalty of 40s, and the offence declared to be a p dittay, by 1457 [a], c. 84, and 1474 [b], c. 59.

—TIME.

VARIOUS regulations were made reſpecting the time it is lawful to kill game, but theſe having been rep ly altered, it is only neceſſary to ſtate how the law ſtands.

[a] James II. [b] James III.

MUIRFOWL, or termagan, cannot be killed, bought, uſed, r had in one's poſſeſſion, from 10th December to 12th luguſt [n]. § 3. REGULATIONS.

HEATHFOWL cannot be taken from 10th December to 0th Auguſt [o].

PARTRIDGES cannot be taken from 1ſt February to 1ſt ptember [p].

IV. THOUGH the act 1621, c. 31, excludes unqualified rſons from hunting, even on their own property, yet it nfers no new right on qualified perſons; nor entitles them, y more than the common law did before, to ſearch for or urſue game on the property of another, without his conſent. qualified perſon can hunt only on his own ground, or here he has obtained liberty from the proprietor. Every oprietor, whether qualified or not, is entitled, by the common law, to prevent every other perſon from coming on his ound [q], even though it be unincloſed, and not likely to be ctually injured [r]. § 4. WHERE IS IT LAWFUL TO HUNT? Not on another's property. Qualified perſons. Unincloſed ground.

In ſome particular caſes, where the riſk of damage from ich treſpaſſes ſeemed to be greateſt, the common law right as been enforced by ſtatutory penalties. Thus, the offences Particular regulations.

[n] 13 Geo. III, c. 54.

[o] Ibid.

[p] 39 Geo. III, c. 34. It makes the me the ſame for England alſo; and, der the penalties contained in 2 a. III, c. 19, viz. the penalty by t ſtatute is 5l. ſterling, on convica by one witneſs in any of the rts of record at Weſtminſter, for ry ſuch fowl, with coſts. It is very clear, therefore, whether re is any penalty exigible in Scotland, under 39 Geo. III, as it refers only to the 5l. payable on conviction in the courts of Weſtminſter. The penalty goes one half to the informer.

[q] Stair, B. ii, tit. 3. § 78; and Craig de Feudis. Lib. ii, dig. 8, § 13.

[r] June 16, 1790, earl of Breadalbane againſt Thomas Livingſtone of Parkhall. Fac. Coll. In this caſe, the ground was not only unincloſed, but an extenſive heath.

§ 4. WHERE IS IT LAWFUL TO HUNT? —STATUTORY PENALTIES.

of hunting or hawking in their neighbours corn, from till the ſame be ſhorn; the travelling through wheat period of the year; or hunting in woods, parks, h within banks or broom, without licence, are, beſid ages to the proprietor, puniſhable with a penalty Scots to the king for the firſt fault, 20l. Scots for

Wheat, &c.

cond, and eſcheat or forfeiture of moveables for the

Searching for.

It makes no difference whether the treſpaſs be con in the ſearching for the game, or in following it whe ed on the treſpaſſer's own ground [t].

Tenant, can he exclude any from hunting on his farm?

THIS right belongs only to the proprietor: The though actually in poſſeſſion of the ſurface, and ent the emoluments thereof during his leaſe, cannot pre landlord, or thoſe who have his permiſſion, from hun his farm [u]. But the tenant will be entitled to damag

Tenant entitled to damages.

ſeemed to be the opinion of the court, that the tenan prevent any perſon from entering fields which wer

Ground ſown with wheat.

and prepared for a wheat crop, the damage, in ſuch being ſo evident and conſiderable [x].

—CHACE OF FOXES BY SHEEP-FARMERS.

IN thoſe parts of the country chiefly occupied in th turage of ſheep, it has been uſual for the farmers an ſervants to join in numerous parties, and traverſe the for the purpoſe of extirpating foxes. If, in the co

Damage, reparation of.

theſe purſuits, they do actual damage to any p property, they are liable to repair it. Theſe purſu

[s] Act 1555, queen Mary, parl. 6, c. 51. This ſtatute is ſtill in force, and ratified by 1685, c. 20. Marquis of Tweeddale againſt Hugh Dalrymple, March 3, 1778. Fac. Coll.

[t] 3d March 17-8, marquis of Tweeddale againſt Hugh Dalrymple. Fac. Coll. The deciſion was, "that the defenders are not entitled to enter or come into the de or other incloſures of the without his conſent, either i ing or following game, or cover, or ſearching for game

[u] Such was unanimouſly nion of the court of ſeſſion i from Ayrſhire, decided No Ronaldſon againſt Ballantine

[x] Ibid.

he purpoſe of public utility, however, the law regards § 4. WHERE IS IT LAWFUL TO HUNT?
ore favourably than hunting for amuſement. In the
tter caſe, no perſon is more entitled to enter the property
f another in purſuit of a fox than in purſuit of a hare or
partridge[x]. But, in the former caſe, it has been found
wful to ſearch for and purſue foxes through the grounds
any perſon incloſed or unincloſed, without his conſent, or
en againſt his will, as in the purſuit of a thief, mad dog, lion,
other ſavage beaſt eſcaped from his keeper[a].

In England it does not appear that this diſtinction is made
tween gentlemen hunting for amuſement, and the country

[x] 3d March 1778, marquis of
reddale againſt Hugh Dalrymple.
c. Coll.

[a] Colquhoun againſt Buchannan,
g. 6, 1785. Fac. Coll.

By the ancient ſtatute 1427, c.
, " it is ſtatute and ordaned be
king, with conſent of his haill
ncell, that ilk baronne within his
onnie in gangand time of the zeir,
ſe and ſeeke the quhelpes of the
ifes, and gar ſlaie them. And
baronne ſall giue to the man that
is the woolfe in his barronnie,
bringis the barronne the head,
ſhillinges. And quhen the bar-
es ordanis to hunt and chaſe the
olfe, the tennentes ſall riſe with
barronne, under the paine of ane
der of ilk man, not riſand with
barronne. And that the bar-
es hunt in their barronnies and
ſe foure times in the zeir, and als
as onie woolfe beis ſeene within
barronnie. And that na man
ke the woolfe with ſchot, but al-
erlie in the times of hunting of
m." And by act 1457, James II, parl. 14, c. 87, it was ordained, " for the deſtruction of woolfes in ilk countrie quhair ony is, the ſheriff or the baillie of that countrie ſhall gadder the countrie folk three times in the year, betwixt St. Makie's day and Lammas, for that is the time of the quhelpes; and quhatever he be that riſes not with the ſheriff, baillie, or barrone, within himſelf, ſhall pay unforgiven a wadder, as is contained in the old act thereupon; and he that ſlays an wolf at ony time, he ſhall have, of ilk holder of that parochin that the wolf is ſlayn within, a penny. And gif any wolf happens to come in the country, that wit be gotten of, the country ſhall be ready, and ilk houſehalder, to hunt them, under the pain forſaid; and they that ſlay an wolf ſhall bring the head to the ſheriff, baillie, or baron, and he ſhall be debtor to the ſlayer for the ſum forſaid; and quhatſomever he be that ſlayes an wolf and brings the head, &c. ſall have ſix pennies."

§ 4. WHERE IS IT LAWFUL TO HUNT?

people turning out in order to extirpate foxes. To juſtify a man's going into the ground of another, it is ſufficient that he is in chaſe of foxes or badgers, becauſe, theſe being beaſts of prey, the deſtroying of them is looked on as a public benefit: Yet the digging and breaking of the ground to unearth them is held to be unlawful, and the owner may maintain an action of treſpaſs in that caſe [b].

§ 5. RIGHTS OF THE PROPRIETOR OF THE GROUND.

V. THE proprietor whoſe ground is treſpaſſed on has an action of damages againſt the intruder; but he has no right of property in the game, which did not previouſly belong to him, and, as Vinnius expreſſes it, *prohibitio conditionem animalis non mutat* [c]; whereas the Engliſh law, which has not adopted this clear and broad rule of Roman juriſprudence, goes into divers diſtinctions, when the game caught on a man's eſtate belongs to him, and when it does not [d].

[b] Burn, tit. Game, § 2. An action was brought for breaking the hedges and trampling the graſs of the plaintiff, with dogs and horſes. The defendants, huntſmen to a qualified perſon, had treſpaſſed in purſuit of a fox. "Lawrence for the plaintiff obſerved, that the queſtion was, whether a perſon hunting has a right to follow foxes upon the ground of another? Lord Mansfield ſaid, that by all the caſes as far back as Hen. VIII, it is ſettled, that a man may follow a fox into the grounds of another .... Juſtice Willis ſaid, that the caſe in Popham, 162, was much ſtronger than the preſent .... Juſtice Buller ſaid, the queſtion in this caſe was, whether the defendant is juſtified in following the fox over another man's ground; it is averred in the plea, that this was the only means of killing the fox. This caſe does not determine that a perſon may unneceſſarily trample down another man's hedges, or maliciouſly ride over his grounds; if he does more than is abſolutely neceſſary, he cannot juſtify it. Judgment for the defendant. Caſ. by Durnf. and Eaſt. 334."

[c] Vinnius, ad Inſt.

[d] Judge Blackſtone obſerves, "if a man ſtarts game upon another man's ground, and kills it there, the property belongs to him in whoſe ground it was killed, becauſe it was alſo ſtarted there; this property arising *ratione ſoli*. Whereas, if after being ſtarted there, it is killed in the grounds of a third perſon, the property belongs not to the owner of the firſt ground, becauſe the property is local; nor yet to the owner of the ſecond, becauſe the game was

§ 5. RIGHTS OF THE PROPRIETOR OF THE GROUND.

IE proprietor of the ground is not entitled to ſeize the ſſer's gun. By act 1707, the dogs, gun, and net, are ted; but it is by a proceſs at law that they are to be red. It was decided in the court of ſeſſion, that a ietor qualified to kill game having, *brevi manu*, ſeized the g-piece of a common poacher, had acted unwarrant- and was obliged to reſtore it in as good caſe as when he [o]. In the court of juſticiary it was decided, that it rder to kill in defence of a fowling-piece, which an- advances to ſeize, not from a felonious intention, but a miſtaken notion that he has a right to take it [p].

E ſtatutory penalties recoverable by the landlord, whoſe ty has been intruded on, are contained in the acts and others above mentioned; and in the act 1707, which probibits common fowlers to hunt on any d without a ſubſcribed warrant from the proprietor, the penalty of 20l. Scots, *toties quoties*, of which one half the diſcoverer, and the other is left at the diſpoſal of the before whom the offence ſhall be cognoſced, beſides ing their dogs, guns, and nets, to the apprehenders or erers. Farther, a common fowler detected in any with guns or nets, without the licence aforeſaid, may t abroad as a recruit.

§ 6. IN GENERAL.

THE ſtatute of the 8 Geo. I, c. 19, enacts, that, where ſon ſhall, for an offence againſt any law in being reſervation of the game, be liable to pay a pecuniary y, upon conviction before a juſtice of peace, it ſhall rful for any other perſon, either to proceed to recover id penalty, by information before a juſtice, or to ſue

n his ſoil; but veſts in the per- ſtarted and killed it, though n a treſpaſs againſt both the B. ii, c. 27, p. 419.

[o] 23d Jan. 1755, Gregory againſt Wemyſs. Dict. V. iii, p. 248.

[p] Earl of Eglinton againſt Mungo Campbell, Dec. 1767. Maclaurin's (lord Dreghorn) crim. caſes, p. 505.

§6. OF GENERAL.

for the ſame by action of debt, or on the caſe, bill, plaint, or information, in any court of record, wherein no eſſoign, protection, wager of law, or more than one imparlance ſhall be allowed; and the plaintiff, if he recover, ſhall have double coſts: Provided that all ſuits to be brought by force of this act ſhall be brought before the end of the next term, (by 26 Geo. II, c. 2, *extended to the end of the ſecond term*), after the offence committed; and that no offender ſhall be proſecuted for the ſame offence both ways; and, in caſe of a ſecond proſecution, he who is thus doubly proſecuted may plead in his defence the former proſecution pending, or the conviction, or judgment thereupon.

Double proſecution.

LORD SWINTON inſerts this ſtatute in his Abridgment, with a query as to its application to Scotland. But the ſtatute is expreſſed generally. Its object is to "render more effectual the laws for preſervation of the game." It does not qualify this by ſaying "in that part of Great Britain called England." The Engliſh phraſeology that occurs in it, is no reaſon for reſtricting it, being common to nine-tenths of the Britiſh ſtatutes, confeſſedly intended to apply to Scotland. Had the act made it lawful to ſue before the court of king's bench, or other Engliſh court *nominatim*, that neceſſarily would have excluded Scotland. But as it uſes the word *court of record*, in general, that certainly may include the court of ſeſſion or juſticiary, although *court of record* is not a technical expreſſion of our law. And thoſe other terms, *eſſoigns*, &c. muſt, ſo far as they are inapplicable to our practice, be held *pro non ſcriptis*; but they afford no fair ground to deny the application of any ſtatute to Scotland, as they occur in ſo many inſtances of general ſtatutes, from the framers of them not adverting that Engliſh law terms are a peculiar language, not intelligible, nor explicable, nor convertible, in foreign courts of law.

rish ſtatutes, which mention no particular limitation, § 6.
e qualified by the ſtatute 31 of Elizabeth, c. 6, which IN GENERAL.
s all penal actions, at the inſtance of a private party, —LIMITATIONS OF ACTIONS.
e brought within a twelvemonth.

his conſuetudinary juriſdiction which the juſtices —REVIEW.
:e exerciſe in game queſtions, the ordinary review
ace from the ſeſſions to the quarter ſeſſions, and thence
igher courts, according to the rules formerly men-

neral, with reſpect to the mode of proof in actions —MODE OF PROOF.
: upon the game acts, it was decided [a], that, in an
for the penalty under the act 1707, againſt ſhooting
t is competent to prove the complaint by a reference
efender's oath; and this has ever ſince been under-
be law.

is determined by the late lord-juſtice-clerk Macqueen, Reference to oath.
reference to oath is competent in the caſe likewiſe
ritiſh ſtatutes touching the ſtamped certificate, when
lty is ſued for by a civil action before the court of
. Whether the ſame thing obtains in the caſe of a
ion for the penalty before the juſtices, has been the
of judicial controverſy, but has not yet been decided
upreme court [d].

1787, the procurator-fiſcal
nty of Edinburgh againſt
lion.
i, c. 7.
or of ſtamps againſt Wil-
hers, June 1797.
complaint, at the inſtance
rator-fiſcal of the county
gh againſt a man for killing
out a licenſe, the juſtices
allowed a reference to the culprit's oath, and on his refuſal to ſwear, ſubjected him in the penalty. This deciſion was affirmed by the quarter ſeſſions; and being thereafter brought under review of the court of ſeſſion by ſuſpenſion, it was pleaded, that a reference to oath was incompetent, 1mo, becauſe the 25 Geo. III, c. 50, is a Britiſh ſtatute relative to the reve-

§ 7. WILD ANIMALS CONFINED.

VII. As horſes, ſheep, poultry, and other creatures, *mitæ naturæ*, are property, and of courſe the ſubjects theft, ſo the ſame thing obtains in the caſe of wild a mals ſo confined, that they cannot eſcape, but may ea at any time be caught, as rabbits in a houſe, young pige in a dovecote, they being then as much property as t carcaſes after ſlaughter [c].

A PARTICULAR ſtatute has extended the ſame law wild animals, not in ſuch a ſtate of perfect appropriat but rather in a kind of middle ſtate; as deer in a park, r bits in a warren, doves in a dovecote, fiſh in a pond. A mals in that ſtate alſo are conſidered as property; and taking or killing them is held and puniſhed as theft. ' act 1474, c. 60, enacts, that "na man hunt, ſchute, ſlay deer, nor reas, in utheris cloſes or parks, or take cunninges out of utheris cunninghires, or ony fowles o utheris doucottes, or fiſh out of utheris puiles or ſtan but ſpecial licence of the owner's, under the pain of di and to be puniſhed *as theft*." So alſo the act 1535, c.

me, where the Engliſh law is made ours; and juſt as the court of exchequer always judge according to the principles of the Engliſh law, ſo, in revenue queſtions, do juſtices of peace. In England, reference to oath is neither admitted in criminal nor civil queſtions: neither, therefore, in this queſtion, can it be admitted in ours. 2*do*, At any rate, the rule here muſt be the words of the ſtatute itſelf, which leaves not this matter to depend on the common law of either country, but particularly ſpecifies the mode of proof to be either by one witneſs, or by the party's confeſſion. It does not authorize the reference to oath; and as the whole juri tion is ſtatutory, there is no auth for going beyond the words o ſtatute. The fiſcal contended, the mention of theſe two mod proof, viz. by one witneſs, and party's confeſſion, did not ex reference to oath, that being co tent by the common law of Sco in the caſe of ſuch ſort of off The queſtion was not decide ſtands on an order to give in d dated 27th Dec. 1803. See I c. 6, § 4.

[c] Hume's Criminal Law, c. 2, p. 99.

h, to the above enumeration, adds the ſtealing of hives § 7.
ees, and further extends the ſame puniſhment "to WILD ANIMALS CONFINED.
are airt, pairt, or gives aſſiſtance to ſik miſdoers." And
ſtatutes[d] appoint ſuch tranſgreſſors to be puniſhed in
n caſes with pecuniary or petty corporal pains; yet
Mr. Hume, the "clear reſult of the whole ſeems to be
raiſing ſuch offences to the rank of theft, and an au-
y for inflicting death in the caſe of flagrant and repeat-
ilt[e]." Rabbits, accordingly, though they leave the
n, and make depredations on the adjoining ground,
t be deſtroyed, being ſtill conſidered as property[f].

PARTICULAR ſtatute has alſo interpoſed for the protec-
of hawks and hounds. It forbids to ſteal hounds or
s, "maids, or wild out of neſts," or even to take the
out of the "hawk's neſt in another man's ground, under
enalty of 10l. Scots[a]."

II. FOR the ſafety of the game, various regulations were § 8.
ed touching muirburn, that is, the practice of ſetting MUIRBURN —SCOTTISH ENACTMENTS.
o the heath, in order to clear the fields. It was enact-
a ſtatute of Robert III[b], that "their ſal be na muir-
, or burning of hedir, bot in the moneth of March; Time.
ot thereafter induring the time of ſomer or of harveſt,
r the paine of 40s. to the lord of the land quhair the Penalty.

503, c. 69; 1607, c. 3.
rim. Law, Vol. i, c. 2, p. 100.
1th July 1801, Dobie againſt
.
474, James III, parl. 7, c. 59;
en ſir George Mackenzie re-
, by this act, it is clear that
ling of dogs, hawks, and the
re not to be puniſhed as theft,
ly by a fine or penalty of 10l.;
a effect, this is not *contrectatio rei alienæ lucri faciendi cauſa*, theſe beaſts being rather uſeful for ſport than gain; but it may be doubted of a fowler who makes it his trade, *et ſic lucrum facit*, may not be puniſhed as a thief for ſtealing another poor fowler's dog who lives by that trade, and whoſe dog is his pleugh, and eſpecially ſince dogs are now bought and ſold." Obſervations, p. 79.

b c. 11.

§ 8. MUIRBURN —SCOTTISH ENACTMENTS.

burning is[b]." Muirburn was afterwards prohibited by the act 1424, c. 20[c], from the month of March, till the corn be cut down, under the pain of 40s. Scots to the lord of the land, or otherwiſe of forty days impriſonment; and failing the lord of the land, power was given to the juſtice-clerk to bring the treſpaſſers before the juſtice: by the act 1479, c. 75, from the laſt day of March until Michaelmaſday, under the pain of 5l. Scots againſt thoſe who are convicted in the juſtice ayr[d]: by the act 1493, c. 48, muirburn, in forbidden time, was declared to be a point of dittay; the perſon who commanded the thing to be done, was made liable in a penalty of 40s. Scots to the king, "becauſe it is clearly underſtandin that the puir bodies that dwellis in maillinges are bot ſervandes to their maiſters that awe the maillinges, and dois it for their command[e]." The perſon who did the thing was liable in another fine or unlaw; by the act 1535, c. 11, the fine or unlaw was for the firſt offence 5l. Scots, for the ſecond 10l. and for the third 20l.[f]: by 1685, c. 20, it was forbidden after the laſt of March, and the maſters were made liable for all upon their lands[g].

—BRITISH ENACTMENTS.

BUT theſe Scottiſh acts, as well as the 6 Geo. III, c. 32, are ſuperſeded by the Britiſh ſtatute 13 Geo. III, c. 54, by which this matter is now regulated. By this ſtatute it is enacted, that "any perſon who ſhall make muirburn, or ſet fire to any heath or muir, from the 11th April to the 1ſt November, in any year, ſhall forfeit 40s. ſterling for the firſt offence, 5l. for the ſecond, and 10l. for every ſubſequent offence; and in caſe of not paying within ten days after conviction by a final judgment, ſhall ſuffer impriſonment for *ſix weeks* for the firſt offence, *two months* for the ſecond, *three*

[c] James I, parl. 1.
[d] James III, parl. 10.
[e] James IV, parl. 4.
[f] James V, parl. 4. See alſo 1503, c. 71.
[g] James VII, parl. .

nths for the third and every other offence [h]. The occupiers the ground upon which ſuch muirburn ſhall be diſcovered thin the forbidden time, ſhall be deemed guilty of the of- ice, and ſhall be liable to the ſeveral penalties aforeſaid, leſs he ſhall prove that ſuch fire was communicated from ne neighbouring ground, or was raiſed by ſome other per- not in his family [i]. But it is provided, that every pro- ctor of high and wet muirlands, the heath upon which quently cannot be burnt ſo early as the 11th of April, y, when ſuch lands are in his own occupation, burn the th upon the ſame, at any time between the 11th and h of April, without incurring any of the penalties before ntioned; and when ſuch lands are let, the proprietor, or factor, may, by a writing, authoriſe his tenants in ſuch ds, to burn the heath thereon, at any time between the h and 25th days of April, without incurring any of the l penalties [k]. The writing authoriſing ſuch burning muſt vious thereto be recorded in the ſheriff or ſteward court- ks of the county within which the lands are, upon pay- nt of the uſual fees [l]. No penalty ſhall be recovered, eſs the proſecution be commenced within ſix months after offence committed [m]."

§ 8. MUIRBURN —BRITISH ENACT- MENTS.

As to the mode of proof, the penalty, the appeal, finality the ſeſſions, theſe things are regulated by the ſections of ſtatute which are inſerted above [n].

[h] § 4. [i] § 5. [k] § 6. [l] § 7. [m] § 14.
[n] § 8, 9, 10, 11, 12, 13, 14. See p. 529.

CHAP. XIII.

Of the Laws concerning the Fisheries.

§ 1 IN GENERAL.

I. THE amuſement of fiſhing, like that of hunting, was by the civil law a common right[a]: and, in the caſe of common fiſhes, that is, thoſe which are not reckoned *inter regalia*, it ſtill remains ſo by the law of Scotland[b].

THE right of catching common fiſh, therefore, requires "no ſpecial conceſſion by the king, or other ſuperior, ſeeing there are common freedoms of every nation to fiſh in the ſea, or into brooks and rivers, for common fiſhes[c]." Without any ſpecial clauſe in their charters, proprietors may fiſh in the waters that run through, or bound, their property[d].

[a] Inſt. de Rerum diviſione et ad quis earum dominis, § 2. See Vinnius' Commentary thereon.

[b] De Feudis, Lib. i, dig. 16, § 38. Per piſcationum reditus non quaſcunque piſcium commoditates ſed tantummodo ſalmonum qui in fluminibus capiuntur, intelligendas putamus.

[c] Stair, Inſt. B. ii, t. 3, § 69.

[d] Bank. B. ii, t. 3, § 3.

her to proprietors is this right otherwiſe excluſive, except ectly, that they can prevent every other perſon from com- t all upon their grounds, whether to fiſh, hunt, or for ther purpoſe of amuſement. In this ſenſe only it is he right of fiſhing is inherent in the property of the ent banks, or to be conſidered as a pertinent thereof; ion fiſhes being truly *res nullius*, and liable to be law- catched by any perſon ſtanding on a highroad or other ground contiguous to the ſtream [e]. Nay, farther, as in ſe of hunting, if a man treſpaſs on the property of an- , without his conſent or againſt his will, the fiſh which tches will be his own property, though he may be in damages to the proprietor for intruding on his id.

VI. IN GENERAL —COMMON FISHES.

In what ſenſe the right of fiſhing is inherent in the property.

Fiſhes not property.

T public rights, or thoſe *totius populi*, were transferred t feudal law to the royal perſon, *ut qui patris patriæ et tutoris perſonam ſuſtinet* [f]. Hence it has been decided, trout-fiſhing, for example, may become excluſive pro- ; nay, farther, that it may be reſerved from the grant lands, and transferred to a third party [g]; ſo alſo in

Crown may give excluſive right of taking common fiſhes.

Trout-fiſhing.

e Fac. Coll. Vol. x, p. 11.

aig, De Feudis, Lib. i, dig. 16,

th Nov. 1787, Robert Carmi- gainſt ſir James Colquhoun. ll.

title deeds of Luſs bear a right fiſhing of ſalmon, and other , in the water of Leven."

proprietors of the grounds ly- g the banks of the river, and all infeft in their lands, ei- *cum piſcationibus*," or with and pertinents," inſtituted an f declarator againſt ſir James; h they ſet forth, " that they and their authors had, by virtue of their titles to the lands, been in the immemorial practice of catching trouts with nets and rods in the river *ex adverſo* of their reſpective properties;" and concluded, that they had a right ſo to fiſh, or " in ſuch other manner as to them might ſeem proper; and that he ought to be prohibited from the exerciſe of trout-fiſhings *ex adverſo* of their lands."

The court ſeemed unanimous in the opinion, that the right of trout-fiſhing in a river, though naturally inherent in the property of the adjacent banks, ſo as to accompany lands

§ 1. IN GENERAL —COMMON FISH.

the ſea, the crown may grant to individuals the excluſive right of fiſhing within certain limits, as, for example, the excluſive right to a particular fiſhery of oyſters.

§ 2. SALMON —*inter regalia.*

II. SALMON fiſhings are underſtood in Scotland, to be *inter regalia minora*; in this ſenſe, that they do not paſs as part and pertinent of land, but require an expreſs grant to take them out of the crown. This rule is in practice ſo far relaxed, that a general clauſe, *cum piſcationibus*, followed with poſſeſſion, is held to be a ſufficient title for acquiring right to a ſalmon fiſhing by preſcription [h].

A general clauſe, *cum piſcationibus.*

A RIGHT to fiſh ſalmon in the ſmall rivers, in which a few fiſhes are only now and then got, and which may rather be called a right to take ſalmon, is commonly given along with the lands adjacent to ſuch rivers; in which caſes, the fiſhery, though no pertinent of the lands, is yet never granted but along therewith.

IN great rivers, however, ſuch as the Tay, where there is

as part and pertinent, might yet be reſerved from the grant, or transferred to a third party, either expreſsly or by preſcription; and that trouts were *res nullius* in this ſenſe only, that any perſon ſtanding on a high-road, or other public ground contiguous to the ſtream, might lawfully catch them.

Some of the judges thought the clauſe "other fiſhings" in the defender's charters ſufficiently expreſsive of the excluſive right of fiſhing trout on the banks in queſtion: which others did not admit; but all ſeemed agreed, that if he or his authors had that excluſive right, it had been loſt by diſuſe.

The court pronounced the following interlocutor:

"In reſpect that ſir James Colquhoun's right to the ſalmon-fiſhings is not diſputed in this cauſe, find he has right to the ſalmon-fiſhing in the river Leven, where it runs through the property of the purſuers: find the purſuers have a right to fiſh trouts oppoſite to their reſpective properties, with trout-rods or hand-nets, but not with net and coble, or in any other way that may be prejudicial to the ſalmon-fiſhing belonging to ſir James Colquhoun, the defender."

[h] Erſk. B. ii, t. 6, § 15.

ch fiſhing as to be the ſubject of a ſeparate grant, ſuch § 4.
SALMON —WHEN IT GOES ALONG WITH THE LANDS.
rants were frequently made not only to the proprietor of e adjacent bank, but to any perſon, whether he had the jacent lands or not; there being no connection between e lands and fiſhings other than what may be called *a deriptive connection*.

ACCORDINGLY, charters or grants of lands are ever under- ood to imply a reſervation of the right of the crown to ant, along with the fiſhery, the privilege of drawing nets on the banks; without which, the right of fiſhing, not ven along with the lands, could not be exerciſed [i]. Drawing nets on the bank.

WHERE a grant is made of a ſalmon fiſhery in any part a great river, it depends on the terms of the grant, whe- er or not it be excluſive of all future grants in that part of e river. In general, a grant of the fiſheries in the river, or ch parts of the river, without limiting the grantee to the awing his nets on one ſide, conveys the whole fiſheries, and plies a power to draw on either ſide, though not men- ned in the grant, as what paſſes as a conſequence of the ht of fiſhing. But where a right of fiſhing is granted ith power of drawing on one ſide, (the uſual form of limit- g the fiſheries to one ſide), the right remains with the own to confer, by a poſterior grant, the fiſheries on the poſite bank [k]. When is the grant of a ſalmon fiſhery excluſive of other grants? Power of drawing on one ſide of the river?

THE mode of exerciſing theſe rights of ſalmon fiſhing s not been left to the diſcretion of individuals, but as an portant object of public intereſt, has been anxiouſly re- ated by many enactments.

IT was early the aim of the legiſlature that the fiſhing —CLOSE ould be diſcontinued at certain ſeaſons of the year, thence

i Kilkerran, p. 500. k Ibid.

§ 2. SALMON —CLOSE.

called *close* or *forbidden*. It had in this a twofold object; the fish being improper for food at those periods, when their preservation is necessary likewise for the multiplication of the species. It was, therefore, prohibited to kill salmon or red fish from the 15th day of August till the 30th November [l]. The punishment for killing salmon in close or forbidden time, was various by different statutes. By act 1449, c. 9 [m], the person guilty, (or art and part therein), was, for the first fault, to be punished with a fine of 40s. Scots; for the second, 4l. Scots; and for the third fault, to lose his office forever. By act 1457, c. 86 [n], the punishment was 10l. Scots, "but (without) remission;" and for the third offence, he was to buy his life: and the same fine is imposed on those who, in smelt time, set vessels, creels, wires, or any other engine, to intercept the smelts from going to sea [o]. By 1503, c. 72 [p], it was for the first offence 10l. Scots; for the second, 20l. Scots; for the third, death. By 1597, c. 261 [q], proprietors of ground adjacent to the rivers were ordained to find security that their tenants should not kill salmon in forbidden time; earls and lords in 2000 merks Scots each; and barons and gentlemen, and others whatsoever, in 500 merks Scots. And by another statute of the same reign, the slaying of salmon in forbidden times, and of kipper smolts, and such black fish, at any time, is ordained to be punished as theft [r].

Twofold object.

Landlords obliged to find security for their tenants.

But these statutes excepted always the rivers of Tweed and Annan, where salmon could be taken at any time, because the said "rivers at that tyme divyded at many parts

[l] James I, parl. 2, 1424, c. 35.
[m] James II, parl. 5.
[n] James II, parl. 14.
[o] Ibid. cap. 86; and 1469, c. 48.
[p] James VI, parl. 6.
[q] Ibid. parl. 15.
[r] James VI, parl. 16, 1600, c. 11. On this statute, however, sir George Mackenzie remarks, "Though the slaying salmon in forbidden time be theft by this act, yet none has ever been pursued capitally therefore, but the same is only punished as a penal statute by an arbitrary punishment." P. 312.

ıds of Scotland and England adjacent to them, the forbearance of the ſlaughter of ſalmon, at ſor- rme, and of kipper-ſmolts and black fiſh at all tymes, have made ſalmond any mair to abound in theſe f the like order had not been then obſerved upon iſh ſide." But this impediment being removed on m of the two crowns, a ſtatute[s] was paſſed, extend- ame prohibitions, under the like penalties, to thoſe s.

§ 2. SALMON —CLOSE. Tweed and Annan.

he ſpawning time being different in different rivers, ing and ſhutting of the fiſhing therein, reſpectively, ly regulated by local acts.

latutory interpoſition concerning forbidden times, ve ſufficed, had the fiſhery been exerciſed only by a line and hook, or ſpear or net, and coble or boat[a].

—CATCH- ING OF. Line, &c.

the net fiſhing, however, d under various denomi- ns, in charters, we find, grants of a right of fiſh- each fiſhing, as well as of ing.

net was probably the ſame otnet fiſhing, which is ſtill enerally in rivers or friths h, all along the north of s well as at the mouth of and on the ſouth ſide of hefe are long nets, which t from the ſhore ſtanting to meet the tide. They rticular in the water from upwards, having weights wn the lower ſide, and ork to make the upper

At the outer end, ſome- rally an anchor, is ſunk in the frith, to which the lower end is faſtened, and which keeps the whole line of nets fixed. A man watches on the ſhore, holding a rope which commands the net, and whenever a ſufficient number of fiſh are ſup- poſed to be within the circle of it, he pulls the rope, draws in the net, and ſo incloſes the fiſh.

But the moſt ancient mode of fiſh- ing in the north of Scotland, was probably the currach, which was a ſmall boat made of wicker and cover- ed with hides, which floated down the ſtream, two men being placed in it, one of whom held one end of the net, while another perſon, or two per- ſons, on ſhore held the other end, and dragged it along. The coble was a larger boat, the improvement of later times.

The currach fiſhing can be exerciſ-

§ 2. SALMON —CATCHING OF.

BUT it ſeems to have become early cuſtomary to c the aid of fixed machinery; two kinds of which, viz and cruives, are taken notice of in our ancient ſtatute in certain ſituations, were tolerated under ſuch limi as ſeemed likely to render them as little detrimental ſible to the brood of the fiſh and to the free paſſage river.

Fixed machinery.

—YAIRS.

YAIRS, or zairs, or wears[b], *piſcaria ſtagna*[c], or fiſh being places built round either with ſtone or timber, wicker-work, which ſtagnates the water incloſed wit walls of the yair, and prevents the paſſage of the fiſ fining them therein till they are caught and taken the owner of the yair, unleſs they can find their w by one narrow, and commonly a crooked or windin age, which conducts into the yair on one ſide, and a ſmall proportion of the fiſh that enter are able to d

—CRUIVES.

CRUIVES, again, are wooden boxes, placed in a dike, that is, a wear or dike of ſtone, ſtretching ac river from one ſide to the other. They are ſituated current or ſtream of the river, where all ſalmon, goin ſpawn or returning from ſpawning, muſt paſs. Theſe on the one ſide, have inſcales, or moveable boards, ſo ed in an angle, that, being impelled in a contrary di to the courſe of the river, they may open at the a contact, and immediately ſhut again, cloſing the angl ſalmon enter the cruives, becauſe they can find n paſſage up the river; and they force their way into t

Deſcription of.

Inſcales.

ed only where the water deſcends in a current, the boat being carried down by the ſtream, while the fiſhers are employed in ſweeping the water with the net. A currach fiſhing was always a night fiſhing.

[b] This latter term *weirs* firſt occurs in act 1457, c. 86, wi the ſame ſenſe with yair.

[c] As they are called in laws.

[d] As they are termed 1563, c. 68.

§ 2. SALMON —CRUIVES.

ushing up the inscales, from the strong impulse in their ature to get up the river. Out of the cruives there is no ssage, but by hecks or grates, the bars whereof are so close to allow only fry or small salmon to pass. The cruive e being not quite so high as the surface of the water, esents a very great, though not an unsurmountable, obcle to the passage of all salmon.

Hecks.

Cruived dike.

—YAIRS & CRUIVES.

BOTH yairs and cruives, besides the injuries with which y threaten the brood of salmon, are encroachments on stream and channel of the river: On both these accounts, refore, they are viewed by the law of Scotland with a lous and unfavourable eye [e].

Exception.

HENCE it is, that, to entitle any person to fish, either by the of a dit or cruive, such right must be specially expressed in grant or title deeds; or, in the case of a barony or corration, there must, at least, be uniform usage, following a general clause *cum piscationibus* [f].

The same kind of contrivances ar to have been practised in land, and not to have been more orably viewed by the English ament. "The fishermen inhabit- the villages on the banks of the ames were used to inclose certain s of the river with what they d *stops*, but which were in effect rs or *kidels*, by stakes driven into bed thereof; and to these they wheels, creating thereby a cur- which drove the fish into those s. This practice, though it may d oddly to say so," sir John Hawobserves, "is against *Magna ta*, and is expressly prohibited by 13d chapter of that statute. In ear 1757, the lord mayor Dickinson sent the water bailiff up the Thames, in a barge well manned, and furnished with proper implements, who destroyed all those inclosures on this side of Staines, by pulling up the stakes and setting them adrift." (Hawkins Walton's Complete Angler, edit. 6th, p. 211.) The passage of *magna charta*, which sir John Hawkins alludes to, is in these words: "*Omnes kidelli* (weares for catching fish) *deponantur de cetero penitus per Thamesiam et Medweyam et per Totam Angliam nisi per costeriam maris.*".

[f] Heritors of the fishing of Don *ag.* town of Aberdeen, 26th Jan. 1665. The proprietors of a salmon fishing in the water of Don brought a de-

§ 4. SALMON —YAIRS & CRUIVES. —WHERE?

FARTHER, neither cruives nor yairs are at all allowed in any part of a river where the ſea ebbs and flows [s].

Freſh waters, &c.

ONE reaſon for this prohibition, ſeems to be, that, in that part of the river where the tide ebbs and flows, the ſurface of the water riſes and falls with the tide, and a cruive

clarator, that the town had no right of cruives, being only infeft *cum piſcationibus et piſcariis*. *Anſwered*, Such a clauſe, granted to an incorporation or community, or being *in barona*, with immemorial poſſeſſion, is ſufficient. "The lords found the town of Aberdeen's title to cruives, albeit conceived, but conform to the firſt clauſe, was ſufficient." This general point alſo occurred in the late caſe of Murray of Broughton, wherein the court decided that the cruive fiſhing might be continued as formerly, with ſome alterations on the machinery ſpecified by the decree.

[s] Erſk. B. ii, t. 6, § 15. James I, 1424, c. 11, "all cruives and zairs ſet in freſh water quair the ſea fillis and ebbis, the quilk deſtroyes the frie of all fiſches, be deſtroyed and put awaie for ever mair; not againe ſtanding ony priviledge or freedome given in the contrairie under the paine of 100 ſhillings." Renewed by James III, parl. 10, 1477, c. 73; and James II, parl. 2, 1489, c. 15.

The act queen Mary, parl. 9, 1563, c. 68, "ratifies and appruevis the acte maid of before be his highneſs maiſt noble gudſchir king James the fourth of gude memory." The act here alluded to was paſſed in the year 1488, by the firſt parliament of James IV. As it is quoted at length in this act of queen Mary, it is probably for this reaſon that it has not been printed either by ſir John Skene or ſir John Murray, in their editions of the ſtatutes. But in the quotation in queen Mary's act, there is a variation from the record, which has been ſupplied by the old edition of the ſtatutes in the Advocate's library, commonly called the Black Acts, where it ſtands as follows, (fol. 83): "It is ſtatute and ordainit, that all cruivis and zairis damnis that war within ſalt water, quhair the ſey ebbis and flowis, be all utterlie deſtroyit and put doune, ald weill thay that pertenis to our ſoverane lord as uthers throw all the realme. And as anent the cruivis in freſche wattere, that thay be maid of ſic largenes, and ſic dayis keipit, as is contenit in the actis and ſtatutis maid thairupone of befor."

The act 1581, c. 3, ratifies and approves all acts without exception, "with regard to the deſtruction of cruives and zairs, ſlaughter of red fiſhes, ſmolts, and fry of fiſhes"... under this exception, "that the preſent act and naething therein contained ſhall be prejudicial to his highneſs' ſubjects, being duly infeft and in poſſeſſion of holding of cruives, zairs, or loupes, with freſh waters, but that they may uſe ... the ſame in time coming, according to their rights, keepand Saturday's ſtop." 1600, c. 11, and 1606, c. 5.

dike, which is no more than the neceſſary height at high water, would, upon the ebbing of the tide, be ſo much above the ſurface of the water without the dike, that ſalmon either could not paſs at all, or, at leaſt, without greater difficulty than from an ordinary cruive dike in the upper parts of the river, which the tide does not reach. And in yairs, again, the conſequence of the variation in the height of the ſurface of the water, occaſioned by the tide, would be, that the yair may be ſo conſtructed that the top of its walls ſhould be ſomething below the ſurface of the water at full tide; whereby the fiſhes might enter, not at one opening only, but on every ſide; while, by the ebbing of the tide, the yair would be ſo much above the water as would completely confine every thing within it, and would therefore be more prejudicial to the brood of ſalmon than a yair ſituated in the upper parts of the river could be. Or, perhaps, the prohibition may have ariſen from the attention of our anceſtors to the natural hiſtory of the fry of ſalmon, which, in the courſe of their voyage to the ſea, when they firſt meet with the tide, turn their heads from the ſalt water, and are inſtantly arreſted in their progreſs; there they lie for ſome time in vaſt numbers, forming a thick compact body; the flowing of the tide carries them up the river, and again they come down with the ebbing of the water; at length, being accuſtomed to the ſalt-water, they proceed rapidly in a maſs to the ocean [h]. It is obvious, that this fact afforded reaſon for the ſtatutory prohibitions againſt erecting cruives and yairs in ſuch ſituations, where they would have been deſtructive to the fry. § 2. SALMON —YAIRS & CRUIVES —WHERE.

One ſtatute ſeems to carry the prohibition ſo far as to exclude cruives and yairs "from ſandes and ſchawls far within Sands and ſhawls.

[h] Dict. Raiſonné Univerſelle d'Hiſtoire Naturelle, par M. Valmont-Bomare, tom. xiii.

§ 2. SALMON FISHINGS & CRUIVES —WHERE.

the water[i]." These words, however, in a late case where this statute underwent some discussion, were thought to apply only to the waters which spread on each side of a river, as the tide rises in it, and which are partly composed of the fresh water of the river, and partly of the salt water brought in by the sea, but not to extend to the coasts of the sea[k].

—CONSTRUCTION.

THERE is no particular statutory direction as to the height of the mounds or cruive and yair dikes. In one controversy, touching the height of a cruive dike, where it was alleged,

Mound or dike, height of.

"that the same ought to be no higher than the water in its ordinary course, neither the time of the flood nor of drought; otherwise they might build the same as high as they pleased . . . The lords considering there was no particular law as to the height of cruives, and that thir parties had suffered the other above forty years, found, that therefore the same should be, *uti possidebantur*, no higher than the old cruives[l]."

If the dike may be above the surface.

In a subsequent case, the court decided, that the cruive dike ought to be "only a foot and a half above the water, as the stream runs at ordinary times from the 15th April to May, neither when it is in speat, nor too shallow and low, and ordained the cruive dike to be so altered and regulated[m]."

i 1563, c. 68. This act, ratifying the statute of James IV, as already mentioned, "has the addition following, that is to say, that all cruives and zairs that are set of late upon sandes and schawls far within the water, where they were not of before, that they be incontinent taen down and put away, and the remanent cruives that are set upon the water sandes to stand till while the first day of October next to come, and incontinent after the said first day of October to be destroyed and put away for ever."

k 3d March 1801, lord Kinnoul against heritors of Seaside.

l 26th January 1663, heritors of the fishings of Don against the town of Aberdeen. Stair, Vol. i.

m 15th November 1701, Falconer of Newton and Scot of Comiston, pursuers of mutual declarators as to their fishings in the water of Northesk. Lord Fountainhall, Vol. ii.

§ 2. SALMON —WAIRS & CRUIVES —CONSTRUCTION.

In the caſe quoted of the diſputed cruives on the water of Northeſk, it was determined, that the "cruive dike ought to be only three ells broad [n]."

Sloping.

In the caſe of the cruive dikes of the river, the court directed them "not to be builded perpendicular, which will hinder the ſalmons' upcoming, but ſloping from the ground to the top [o]." In like manner, in regard to the Northeſk, the order of the court was, that the "cruive dike ought to be built ſloping from the top, till it was two feet beneath the water, and then from that perpendicular till the bottom [p]."

Hecks or bars of the grate

In another caſe, touching the conſtruction of machinery for a cruive fiſhing, on the ſaid river of Northeſk, it was decided that the "cruive boxes muſt be built upon the channel or bottom of the river [q]."

Hecks, how many inches wide?

The hecks muſt be three inches wide, that is, the bars of the grate muſt be each three inches aſunder [a], and muſt be perpendicular [b], even though, in any particular river, they would have been from time immemorial placed horizon-

Lord Fountainhall, Vol. i, p. 123.
Lord Stair, Vol. i, p. 256.
Lord Fountainhall, Vol. ii, p. 123.
4th July 1769, lord Halkerton againſt Scot of Brotherton. Fac. Col.
[o] Apology in this caſe for not having them on the bottom was, "the cruive boxes, which muſt of neceſſity have a foundation of ſtone to reſt on, were placed as near as poſſible to the middle of the river, and only about two inches above it."
James III, parl. 10, 1477, c. 73.
[p] 1st Jas. IV, 1489, c. 15, ſays five inches; but this "the lords found to be a miſtake in the tranſcribing or printing of the act of parliament, in reſpect that both this and the former relates to the ſtatute of king David, as the pattern thereof, which mentions but three inches, and that hecks of five inches wide will be of no uſe, nor hold in any ſalmon." (Lord Stair, Inſt. B. ii, tit. 3, § 70.) The deciſion Lord Stair alludes to is that of the heritors of the fiſhings on the water of Don, reported by himſelf, and which was quoted above on another point.

[b] The ancient ſtatutes do not ſay whether the hecks ſhould be placed from ſide to ſide, or upwards and

§ 2. SALMON —CRUIVES.

tally[c]. In a cruive fiſhery on the river Dee, the hecks or bars had been ſharp and pointed. This, with other particulars, being made the ſubject of judicial complaint, the court of ſeſſion directed the hecks to be made round, and not, as formerly, ſharp and pointed, as being obviouſly prejudicial to the fiſhes[d].

Round, and not ſharp.

downwards. They enact generally, that they muſt be three inches wide, which the court decided muſt mean broad. Dec. 7, 1762, earl of Moray againſt Callender of Craigforth. Fac. Coll.

[c] Ibid. Fac. Coll. V. iii, No. 100.

[d] 13th Dec. 1799, Murray of Broughton againſt Stott. The court of ſeſſion "ſuſtained the title of the purſuers to inſiſt in the action, found that Mr. Murray had right to a cruive fiſhing in the river Dee, at the places marked in the plan, Meikle Doach, Priory Doach, and Little Doach, but found that the cruives or doachs muſt be regulated in terms of the laws regarding cruive fiſhings; and that the blind eyes and other artificial obſtructions or barricades, to interrupt the run of the fiſh in the river, within the bounds of the defenders fiſhings, muſt be removed as illegal: Found the defender bound to place the cruive boxes to which he had been found entitled at the Meikle Doach, Priory Doach, and Little Doach, *that the rungs or bars of the cruive boxes muſt be placed at a diſtance not leſs than three inches, and muſt be made of an oval ſhape, with the edges rounded off*; that the form and conſtruction of the cruive dike and boxes, and the conſtruction and poſition of the inſcales, are to be ſo formed, conſtructed, and fixed, as to anſwer the purpoſes of a cruive fiſhery, and agreeable to the practice of theſe fiſhings in the north of Scotland, where the cruives have been regulated according to law; that the ſpaces between the rocks, from which the blind eyes are to be removed, are to be filled up with proper materials, formed and conſtructed like other cruive dikes; that the Saturday's ſlope muſt be obſerved in all the cruives, according to law; and that the inſcales, during that time, muſt be taken out and removed, or, when that cannot be done from the ſtate of the river, that the ſame ſhall be drawn back and properly fixed, ſo as to leave a free paſſage up the river for the ſalmon; and that the purſuers and their ſucceſſors having right to ſalmon fiſhings in the upper part of the river, are to have the liberty, upon previous notice, to view the cruive and cruive dike, that they may know if the regulations now eſtabliſhed are properly obſerved." This judgment was brought under the review of the houſe of peers, which, (28th February 1802), ordered and adjudged, that the ſaid interlocutor of 15th December 1799, complained of in the ſaid appeal, be varied, by leaving out after the words 'are to be,' the words 'ſo formed, conſtructed, and fixed,

proprietors of a cruive fiſhing in the Southeſk had the practice of ſheeting, (or putting a ſheet all daub- § 2. SALMON CRUIVES.

rer the purpoſe of a cruive
id agreeable to the practice
ſhings in the north of Scot-
re the cruives have been."
is further ordered, that the
remitted back to the court
in Scotland to review this
e ſaid interlocutor, for the
f giving, and to give, pre-
tions to the parties for re-
the form and conſtruction
ive dikes and boxes, and the
on and poſition of the in-
ording to law." And it
er ordered and adjudged,
ith the above variation to
terlocutor, the ſeveral in-
s complained of be affirm-
ereafter, 25th June 1802,
rdinary "having conſidered
on, and remit thereon from
, judgements of the houſe of
nute for the petitioners, and
for the truſtees of James
eſquire, to the petition and
mand, decerned, and declar-
ms of the ſaid judgement of
e of lords: And further
at the cruive dike ſhall be
no height as it has formerly
h of rough ſtones, in a com-
ſubſtantial manner, without
projecting ſtones; Found,
ſpars of the hecks ſhall be
nular, and ſhall not exceed
dimenſions as at preſent,
inches of depth in the di-
f the ſtream, and two inches
f croſs the ſtream: that the
ge ſhall be one inch thicker
upper, and that they ſhall
be rounded to a ſemicircle both at the upper edge and the lower: Found, that the inſcale or combs ſhall be ſo conſtructed as to anſwer the purpoſes of a cruive fiſhing as formerly, and ſhall not be altered to the prejudice of the petitioners: Found, that the new cruives ſhall be of the ſame length, and breadth, and depth, as formerly, according to the plan in proceſs, and ſhall be placed in the dike in the ſame manner as formerly; and decerns: Appoints the parties to give in minutes as to the propoſed regulation, whether there ſhall be no openings or ſpars laid acroſs on the top of the cruive box as formerly, or that the ſame ſhould be cloſely covered over with wood: And alſo, as to the regulation, that there ſhall be no fiſhing from the 26th of Auguſt to the 11th of December in every year, and that, during that time, the cruives muſt be entirely removed, and the channel of the river kept clear and open, without any ſtones or other materials being allowed to remain in the opening of the ſaid cruives; and to put printed copies of the ſaid minutes into the lords' boxes, in order to report the ſame to the court." Minutes accordingly being given in, the court, (6th July 1802), "upon report of lord Methven, and having adviſed the mutual minutes for the parties, found that the cruive boxes muſt be cloſely covered with wood at the top; and that the hecks and inſcales muſt be removed in forbidden times, and found it unneceſſary to determine upon the demand

§ 2. SALMON—CRUIVES—CONSTRUCTION.

ed with pitch, on the cruive-box), whereby the fiſh going up to ſpawn were entirely ſtopt. This was conſidered to be unwarrantable, and ordered to be removed. It was pleaded in excuſe, that "without this privilege of ſheeting in low water to gather water to make their well go in drought, the rent of the mill would fall at leaſt one half," the court wiſhed to deviſe a mode of determining at what particular height of water they ſhould be permitted to ſheet, taking off the ſheeting when the water roſe above it, ſo as to provide for the going of the mill, without any great damage to the upper fiſhing. "And for ſolving the inconveniences on all hands, it was offered by the town that a ſlop ſhould be fixed in the river, on which ſhould be a mark or ſedge for determining high or low water, and when the river ſunk below the ſedge they might ſheet, and when it roſe above it, then it ſhould be removed [c]."

Shoeing or cauſeweying the channel.

IN one caſe already quoted, where the ſubject of cruives underwent much diſcuſſion, it was decided, that "the ſhoeing or cauſewaying in the river, further down than the lower end of the keying ſtones, muſt be taken away and removed [f]."

How obſerved.

THE cruive dike affording ſo difficult a barrier againſt the progreſs of the large ſalmon up the river to ſpawn, the legiſlature thought it neceſſary that "the Saturday's ſlop be obſerved in all cruives; which was to continue by pulling up all the hecks to the breadth of an ell in every cruive, from Saturday at ſix o'clock till ſun-riſing [g]." In one caſe it was

of the purſuers, for obſervance of the act of parliament reſpecting cloſe time." This judgment has been appealed from, as *ultra vires*, as far as regards the directions for building the cruive dike and covering the cruive boxes with wood.

[c] 26th Feb. 1704, heritors of Southeſk againſt magiſtrates of Brechin, Lord Fountainhall.

[f] 4th July 1769, lord Halkerton againſt Scot of Brotherton. Fac. Col.

[g] Sir George Mackenzie's Obſervations on act James I, parl. 1, 1424.

determined not to be neceſſary that the inſcales ſhould be taken out during the Saturday's ſlop, "but that it is ſufficient, in times of flood [h], to fix them back, ſo as they may remain open for the purpoſe of the Saturday's ſlop [i]." In another caſe, it was not conſidered neceſſary, in forbidden times, to remove the ſoletrees, or ſidepoſt of cruive boxes, but only the hecks and inſcales [k]. §2. SALMON —CRUIVES —SATURDAY'S SLOPE.

THIS regulation concerning the Saturday's ſlop is ſtill in force [l]. Being intended, however, merely to counteract the pernicious effects of cruives, it does not apply to the caſe of ſalmon fiſhery, eſtabliſhed by preſcription at a mill-dam [m]. Salmon fiſhing at a dam. By preſcription.

ANOTHER thing anxiouſly enjoined by ancient ſtatutes, as the freedom of the mid-ſtream, or, to uſe the words of the ſtatute enacted by king Alexander, with conſent of the —MID-STREAM.

II, whereby it was ordained "that ry that hes cruives in freſh waters, it they gar keep the lawis, anentis tuerdaie's ſlop ... under the ſaid ine 100s." The earlieſt of the laws ncerning the Saturday's ſlop is one king Alexander, whereby it is ſtate, "that all wateris ſall be fre, d that within thame na man ſall y fiſch fra the Saturday eftir the in ſong or evining prayeris untill onday efter the ſon ryſing." Balfour's Practics, p. 544.

h. These words were added by the ajor of lords in their judgement, hich ſo far varied the deciſion of he court of ſeſſion.

i 4th July 1769, lord Halkerton gainſt Scott of Broughton. Fac. Col.

k 21ſt January 1783, lord Banf gainſt earl Fife. Fac. Col.

l 4th March 1765, Fraſer againſt he duke of Gordon.

m 21ſt Dec. 1750, Robertſon againſt Stewart Mackenzie. Here the fiſhing had been exerciſed at a particular kind of bulwark erected in the river, at a place where the water was contracted betwixt two rocks; and ſo great a fall of water occaſioned by the dam, that no fiſh could get over it unleſs in great ſpeats. The ſuperior heritors brought a proceſs, concluding to have it demoliſhed, or, at leaſt, that the defenders ſhould be obliged to leave a Saturday's ſlop, and to keep ſuch an opening at all times, as might give free paſſage to the ſmolt or fry. "The court determined, that, in reſpect of the charter and act of parliament in favour of the defenders and auchters, and of the immemorial poſſeſſion held by them in virtue thereof, the bulwark in controverſy cannot now be demoliſhed or taken away, and therefore aſſoilzied."

§ 2. SALMON—MIDSTREAM.

eales, barones, and judges of Scotland, "that the midſt of the water fall be ſre in ſa mekil that ane ſwine of thre zeir auld, and well fed, is of length, and may turn himſelf within it, in ſic ane manner that neither his geunnie nor his tail tuich ony of the ſides of the cruives that are biggit on the ſide of the water [n]." But this has fallen into complete deſeutude [o].

—MILL-DAM.

AGREEABLY to the general ſpirit of theſe enactments touching cruives and yairs, a ſpecial act was paſſed for regulating mill-dams. In reſpect that ſalmon fiſhing is much prejudiced by the height of mill-dams, there is ordained by the ſtatute 1696, c. 33 [p], a conſtant ſlope in the midſtream of each mill-dam-dike; and if the dike be ſettled in ſeveral grains of a river, there is to be a ſlope in each grain, except in rivers where cruives are ſettled. The ſlope muſt be as large as can conveniently be allowed, ſo as not to prejudice the going of the mill. Fiſhing at ſuch dam-dikes is prohibited, under the pains to be inflicted againſt thoſe who kill black fiſh, and deſtroy ſalmon fry.

IN like manner, on the common law, the court of ſeſſion has occaſionally interfered to put a ſtop to whatever ſeemed either injurious to the brood of fiſhes, or obſtructive in the channel of a public river.

THUS ſtent nets, (that is, nets fixed by ſtakes, and going acroſs the river), have been prohibited [q]. So alſo, making

[n] Balfour, p. 544.

[o] Sir George Mackenzie's Obſervations, p. 8. 26th Jan. 1665, heritors of fiſhings of Don againſt town of Aberdeen. *Pleaded*, "the old acts anent the middle ſtream were wholly in deſuetude, and were, in effect, derogate by the act of king James VI anent cruives, which ordains Saturday's ſtop to be keeped, but ſtations not the middle ſtream, . . . lords conſidering the middle ſtream has long been in deſuetude."

[p] Will. parl. 1.

[q] 10th Feb. 1693, fiſhings of Don, Lord Fountainhall.—19th Nov. 1771,

ts; for "every heritor, through whose lands a public § 2.
er runs, has a right to all the ordinary uses of it; but SALMON—MASK-
e channel is *juris publici*. The crown may give a right ING NETS.
salmon fishing, but it can give no right of putting
y permanent interruption in the channel. Every heritor
s a right to prevent it, and no length of time can au-
orize its continuance. The crown may, indeed, under
rain regulations, which are intended partly for the be-
fit of the heritors, grant a right of cruives. This is,
wever, to be considered as an exception from the common
w." On these principles, the court of session again de-
ded, that the "mode of fishing by means of stented nets,
d stobs or stakes, stretching nearly across the mouth of the
er . . . being of a very destructive nature, and impossible
be regulated in the manner of a cruive fishing, is illegal,
d cannot be sanctioned by any usage[s]." In like manner

e of Queensberry against marquis Annandale, (not collected), see ort of the case.—21st Dec. 1793, James Colquhoun against the ma-rates of Dumbarton.

in Loch-Lomond, and the river en, a right of salmon fishing had i exercised by means of marking-extending across the river. These , the meshes of which were from to eight inches wide, were put e into the water a little above the th of the river, and reached as e the shore on each side as there depth of water for a coble. y were sunk on the water with , and floated on the other by s and to prevent their being ed down by the stream, they re supported by, but not fastened stakes stuck into the channel, at ain distances from each other, leaving an empty space of about twenty feet in the middle, in order to allow boats to pass. This being complained of, "the court of session almost unanimously decided, that the defender having produced no right to a cruive fishing, he is not entitled to exercise his right of fishing by stobs and nets . . . nor to interrupt the navigation either in the water of Leven or in the mouth of Loch-Lomond." 27th Dec. 1793, sir James Colquhoun against the duke of Montrose and magistrates of Dumbarton. Fac. Col.

[s] Observation of the court. See above, ch. ii, § 3.

[t] Sir James Colquhoun against duke of Montrose, July 4, 1804. Fac. Coll. The cause having come again before the court of session by remit from the house of peers,

§ 4. SALMON HANG-NET.

it has been determined, that it is illegal to exerciſe the right of fiſhing by means of hang-nets, which have nearly the ſame effect with ſtent-nets, and are hurtful both by the obſtruction they occaſion, and, when the fiſh are left hanging in them, by frightening other ſalmon from coming up the river [u].

Solway frith.

Mode of fiſhing there.

In the Solway frith, the rights of ſalmon fiſhing had long been exerciſed in a particular manner, which lately was attempted in the river Tay, where in high water it is two miles, but, in low water, only half a mile broad. At the diſtance of a mile and a quarter from the river, an incloſure, containing a ſpace of about fifteen acres, is made of ſtakes and netting, which opens as the tide flows, and ſhuts when it ebbs, detaining all the ſalmon that enter during the flowing of the tide. And a line of netting, eight hundred and twelve yards in length, running obliquely down the river, directs the fiſh to the incloſure, as well as takes the fiſh returning with the ebb tide. The meſhes of the nets are twelve inches in circumference. This being complained of by the proprietors of the ſuperior fiſheries, the court, on the ſame general ground that governed ſo many former caſes, viz. the illegality, by the common law, of other modes of fiſhing, excepting cruives and yairs, as regulated by ſpecial ſtatute, decided, that it was ille-

[u] In the river Annan, a ſalmon fiſhing was exerciſed from time immemorial, by hang-nets. The net is fixed by one extremity on the ſhore, and there drawn diagonally downwards across a ſmooth part of the river, and reaching not above one half of the breadth of it. The other extremity of the net is left looſe. The one ſide of the net is ſunk by ſmall pieces of lead, and the other ſupported by cork, ſo as to make the net ſtand perpendicular in the water; and when the fiſh come into it, the net yields, and the fiſh is caught by being entangled into it.

The court of ſeſſion prohibited the defenders from erecting "any engine, or uſing any method not for the purpoſe of catching fiſh, but for obſtructing or preventing them from paſſing up the river; and, in particular, from uſing ſtent nets or hang nets of any ſort or denomination." May 1797, lieutenant-colonel Dirom *v.* Little. Fac. Coll.

pal, andought to be diſcontinued [z]. This deciſion was affirm- § 2.
d by the houſe of peers on appeal. SALMON —LARGE INCLOSURES.

THE ſtatutory reſtrictions extend no farther than to rivers Statutory reſtriction
here the ebbing and flowing of the tide is diſcernible.

SOME proprietors of fiſhings, farther down the river, have What they
tempted the ſame machinery, alleging, that the previous apply to.
ciſions affect not their fiſhings, as being not on the river
: all, but either in the frith of Tay, or in the ocean. This
ea has not yet been decided, nor any clear limits affixed to
e debateable ſpace where the river ends and the ſea or frith
:gins.

BY the ſtatute 9 Geo. II, c. 33, § 4, there is a prohibition —LOB-
ainſt killing lobſters on the coaſt of Scotland, from the 1ſt STERS.
y of June to the 1ſt day of September. The penalty is 5l. Time of
ching, which any perſon may ſue for, on a ſummary com- catching.
laint before two juſtices of peace of the ſhire on the coaſt Two
here the offence is committed. The perſon who brings the juſtices.
mplaint gets the penalty.

III. WE have numerous enactments for the encouragement § 3.
d right conducting of the fiſheries. With the ſame vain GENERAL REGULA-
d overweening attention, which marks the early legiſlation TIONS.
f moſt countries, our legiſlature anxiouſly interpoſed their
uthority as to the ſelling of all fiſh publicly [a], to all men [b],
the king's market [c]; when it was lawful, and when not,
take the fiſh to a houſe [d]; the unlawfulneſs of buying to
ll again at the ſea coaſt; buying to ſell again, or cutting in

[z] 26th Jan. 1802, earl of Kinnoul againſt Hunter.
[a] Leges Burgorum, c. 67.
[b] Ib. c. 72.
[c] Ib. c. 79.
[d] Ib.

§ 3. GENERAL REGULATIONS.

pieces before the firſt hour in ſummer and the third in winter; ſelling at the water inſtead of the market[e].

THE act 1705, c. 2, which, as well as 1693, c. 5, contains general regulations with regard to the loyal curing and packing of herrings and ſalmon, empowers ſheriffs, bailies of regality, and magiſtrates of boroughs, or any having commiſſion from them, to viſit, on all occaſions, the curing and

[e] Iter Camerarii, c. 16. Here the meaſure and ſize of the barrel is particularly regulated. The ſtatute, parl. 1477, c. 76, intitled, "of the bond of ſalmond," ſets forth, "that it is heavily murmured, and the realme greatly ſlandered be ſtrangers and uthers that byis ſalmond, of the miniſhing of the veſſells and barrelles that the ſalmond is packed in," and for this reaſon, all ſalmond are ordained to be packed in barrelles of the meaſure of Hamburgh. The firſt ſeller who ſells the fiſh in barrelles under this ſtandard, is to forfeit the fiſh to the king, and the cooper who made the barrelles is to pay to the king 5l. And by parl. 1487, c. 110, the barrel is to contain fourteen gallons, and every barrel is to be marked with a burning iron. If any barrel be found leſs than this meaſure, the ſalmon it contains are to be eſcheated, if it be unmarked, the barrel is, in this caſe, to be eſcheated. By act 1493, c. 52, it is declared to be a point of dittay for any craftſman to make the barrel of a leſs capacity; and the perſon convicted is to be liable in the penalty of 10s.

By act 1540, c. 109, one bind and meaſure is ordained to be made for ſalmon and herring; and each caſk muſt be marked by the maker, and alſo by the mark of the town where it is made; for which purpoſe the town is to have a ſearcher, who ſhall have the town's mark in his keeping to burn each barrel with the mark ſo that the king's cuſtom be not defrauded: and if any fiſh, ſalmon, herring, or keeling, be found in the barrell unmarked, the ſame ſhall be eſcheated.

By act 1573, c. 57, every ſalmon barrel muſt contain twelve gallons of the Stirling pint, and every barrel of herring and white fiſh muſt contain nine gallons of the ſame ſize. The cooper is to burn and mark the ſame with his own proper mark: and whoever fails herein is to be puniſhed according to the ſtatutes. And the ſtatute, act 1581, c. 141, ordains a juſt meaſure and ſtandard for ſalmon to be made by the boroughs, conform to the acts of parliament, and the ſame to remain at the borough of Aberdeen and that there be a juſt ſtandard meaſure for herring and white fiſh which ſhall be marked, and remain in the keeping of the provoſt, bailie of Edinburgh. And act 1691, c. 33, every ſalmon barrel muſt contain at leaſt ten gallons of the Stirling pint, and muſt be marked by the cooper, and by the borough

of herring and white fish in their respective bounds; to break open any barrel, and to secure the whole here insufficient herring or white fish are found: fender is to pay 100 merks for each last; the half to verer, and the half to the poor of the parish. § 3. GENERAL REGULATIONS.

8th article of the Union, it is provided, that, from the Union, the acts of parliament in Scotland for uring, and packing of herring, white fish, and sal- foreign salt, for exportation, shall be continued in that fish exported from Scotland, so secured, shall same premiums that are allowed in England. In o, to encourage the herring-fishing, the sum of 10s. ng is to be allowed for every barrel of white her- orted from Scotland. And by the 7th Anne, c. 10, ns are made for the better ascertaining and securing wances given by the articles of Union to those who from Scotland, cured with foreign salt.

the Union, there have been numerous enactments g the fisheries, particularly the herring fishery; as, ple, against damnifying any of the nets or other ma- longing to the free British fishery[t]. Various acts have ed, giving bounties for encouragement of the her- ery; but which it would be improper to state at ecause they are temporary statutes, and are from ime varied[s].

[t] 11, sec. 24, 99. If any per- maliciously or destroy, without the society of the Free ery, any of the nets, sails, ropes, or other materials e the said society; he shall, on oath of two more one justice, forfeit to treble value, by distress; and for want of sufficient distress, be committed to the house of correction to hard labour for any time not exceeding three months, or till satisfaction be made. Prosecution to be in six calendar months.

[s] Thus, after June 1787, an annual bounty was given for seven years by 26 Geo. III, c. 81, which was con-

§ 3. GENERAL REGULATIONS.

THE importation of any fiſh, except eels, lobſters, and turbots, was prohibited by various ſtatutes[h], under certain penalties; and in order to diminiſh the expence attending the recovery thereof, it was provided by 26 Geo. III, c. 81, § 113, that all ſuch penalties may be recovered before any two juſtices, on proof, by confeſſion or oath of one witneſs. The penalty is levied by diſtreſs, and goes to the informer; and for want of diſtreſs, the offender may be ſent to the common goal for one year: and, that perſons may not by flight evade impriſonment, the offender may be detained any time, not exceeding forty-eight hours, as ſhall be allowed for the warrant of diſtreſs[i].

tinued and varied by ſubſequent ſtatutes, (35 Geo. III, c. 56, till 5th April 1801; by 39 Geo. III, c. 100, and till 15th April 1804, 41 Geo. III, (U.K.) c. 97, § 5, 43 Geo. III, c. 79, § 1.)

[h] 1 Geo. I, c. 18, 9 Geo. II, c. 33; and 26 Geo. III, c. 81.

§ 47.

Provided, that if it ſhall appear to the ſatisfaction of ſuch juſtices, either by confeſſion, or other witneſs, that ſuch party hath not goods ſufficient to anſwer the penalty, ſuch juſtices may, without iſſuing any warrant of diſtreſs, commit the party ſo convicted, as if ſuch warrant had actually iſſued, and a return of *nulla bona* been made thereon. § 48.

Provided alſo, that if any ſuch offender ordered to be committed, ſhall before his commitment procure ſufficient ſureties, for payment of the penalties and charges, within fourteen days, exclusive of the day of conviction, the juſtices may accept ſuch ſecurity; and on non-payment within the time limited, any two juſtices may recommit the party convicted, and alſo his ſureties, to the common gaol, for the ſame time as the perſon convicted would have been liable to if no ſecurity had been given, unleſs the penalty and charges are ſooner paid. § 49.

Any perſon thinking himſelf aggrieved may, within three months appeal to the ſeſſions, giving ſix days notice to the informer, and with ſufficient ſureties entering into recognizance before one juſtice, to appear and proſecute ſuch appeal, and abide the order of, and pay the coſts awarded by, ſuch ſeſſions (if any); and if the judgment be affirmed, the party appealing ſhall pay double coſts, to be aſcertained by the court. § 50.

And in caſe the party appealing ſhall have paid the penalty into the hands of the juſtices, by way of diſtreſs, or ſhall be then impriſoned, ſuch perſon may appeal, on his entering (without ſureties) into recognizance as aforeſaid, and remaining in gaol in the mean time, or depoſiting the penalty with the juſtices until the appeal ſhall be determined, and ſhall be entered and proſecuted with effect at the ſeſſions next after ſuch conviction, or the judgment ſhall be decided by the ſeſſions to want of form, or through the mi

§ 3. GENERAL REGULATIONS.

THERE were various ſtatutes reſpecting ſalt-bonds, granted by perſons ſhipping ſalt to be tranſported coaſtwiſe, for the purpoſe of curing fiſh, ſuch perſons being exempted from the duties. Theſe ſtatutes[k] were repealed, and new regulations ſubſtituted in their ſtead by 41 Geo. III, c. 91, intitled, "an act for the better regulation and collection of certain duties of exciſe;" for the particulars of which enactments, recourſe muſt be had to the ſtatutes themſelves, or to Mr. Huie's accurate compilation.

§ 4. OYSTER FISHERIES.

IV. A LATE ſtatute has been paſſed for the protection of oyſter fiſheries. By the 31 Geo. III, c. 51, it is provided, that if any perſon ſhall, with any net, traul, dredge, or other inſtrument or engine whatſoever, take or catch any oyſters or oyſter brood, within the limits of any oyſter fiſhery of this kingdom, or make uſe thereof for the purpoſe of catching oyſters or oyſter brood, although none be actually taken; or ſhall drag upon the ground of any ſuch fiſhery with any net or other engine; every ſuch perſon (other than the owner, leſſee, or occupier of ſuch fiſhery, or perſon lawfully entitled to catch oyſters therein), ſhall be deemed guilty of a miſdemeanor, and may be indicted at the aſſizes or quarter ſeſſions for the county or diviſion; and the juſtices in ſeſ-

being of any fact, circumſtance, or other matter, provided the material fact in which ſuch conviction is grounded, be proved to the ſatisfaction of the court. And the proceedings of the ſaid court ſhall be removed by *certiorari* into any other court.

Witneſſes not appearing, having duly ſummoned, may be apprehended by warrant of ſuch juſtices, and brought before them; and if any ſuch ſhall refuſe to be ſworn, and to give evidence, or wilfully forſwear himſelf, or prevaricate in his evidence, ſuch juſtices may commit him to the common gaol for one year, without bail. § 44.

And the examination of every witneſs ſhall be taken down in writing; and in caſe the party accuſed cannot be made to appear at the time of ſuch examination, or any witneſs cannot be made to attend when ſuch offender ſhall appear; in that caſe, ſuch examination in writing may be read and made uſe of, and ſhall have the ſame effect as if ſuch witneſs had been examined *viva voce*. § 45.

[k] § 7 and 8 of Geo. III, c. 65.

§ 4. OYSTER FISHERIES.

ſions may hear and determine all ſuch offences: A ſuch offender being convicted by verdict, or on his o confeſſion, may be puniſhed by fine and impriſonment, of them, as the court ſhall think proper; ſuch fi exceed 20l. or be leſs than 40s.; and ſuch impriſonr to be for more than three months, nor leſs than one

Offenders may be puniſhed.

ANY juſtice, upon complaint on oath within 30 ſuch offence having been committed, may by warra ſuch offender to be brought before himſelf, or any o tice, who may commit him to the common gaol priſon, until the next aſſizes or quarter ſeſſions, wh ſhall firſt happen, unleſs he enter into recognizance ſureties in 20l. each, to appear and anſwer to any in which may be preferred againſt him by virtue of thi

[a] § 1. [b] § 3.

And if any ſuch perſon (except as aforeſaid) ſhall be found taking or uſing engines for taking oyſters or oyſter brood, within the limits of any oyſter fiſhery, who ſhall refuſe to diſcover his name and place of abode to the owner, leſſee, or occupier of ſuch fiſhery, or his apprentice or ſervant, he may ſeize and detain ſuch offender, and carry him before a juſtice, who, on oath being made of the offence, ſhall proceed againſt him in the ſame manner as if he had been apprehended and brought before him by virtue of a warrant. § 4.

But no juſtice ſhall commit any ſuch perſon, or require ſecurity from him for his appearance as aforeſaid, unleſs one ſufficient houſholder, being an owner, leſſee, or occupier, or otherwiſe lawfully entitled to catch oyſters in ſuch fiſhery, ſhall enter into recognizance in 20l. for his appearance at ſuch aſſize or quarter ſeſſions, and there to proſer a bill ment againſt ſuch offender

If after any ſuch perſon been committed, two ſuffici ſhall, before any juſtice, e cognizance in 20l. each for ance of ſuch perſon ſo co ſuch next aſſizes or quart and to anſwer any indict may be preferred againſt juſtice may by warrant ord ſon to be diſcharged out of c

It is provided, that noth ſhall extend to hinder any catching or fiſhing for any in the waters or creeks wi mits of any oyſter fiſhery.

It is farther provided, t ſhall not affect any act n reſpecting any particular ery; or preclude any pro the common law, for any o in deſcribed: but no per liable to have an action bro him for any offence for wh have been puniſhed by this

BOOK V.

PUBLIC POLITY.

CHAP. I.

Of the Cess or Land-Tax.

§ 1. HISTORICAL VIEW.

THE ceſs or land tax is not of great antiquity in this country. The royal demeſnes and the caſualties ariority enabled the ſovereign to ſupport the dignity crown; while the routine of civil affairs and adminiſ- of juſtice, as well as military ſervice, were carried on inſtrumentality of feudal vaſſals, agreeably to their ive tenures.

In feudal times.

y. In feudal times of greateſt purity, the vaſſal grate-

the ſources of the royal reve- der the feudal governments by Dr. Stuart in his Public Law and Conſtitutional Hiſtory of Scotland, p. 42.

§ 1. HISTORICAL VIEW.

fully and affectionately aided his lord on every contin of extraordinary expence; as, when his eldeſt daught married, when his eldeſt ſon was made a knight, or the lord himſelf had to be ranſomed from captivit which occaſions, it hence came, in proceſs of time, conſidered a bounden duty for the vaſſal to contribute

Pecuniary aids by the vaſſals to the feudal lords.

First inſtances of national taxation.

ACCORDINGLY, the firſt national taxes, in this co took place on occaſion of ſuch national emergencies, example, the redeeming our national independence, wh been ſurrendered as the price of William the Lion's from captivity; raiſing the 14,000 merks; the marria tion of the daughter of king Alexander III. and ev tenth of the rents, gratefully granted to king Robert during his life, was an extraordinary ſupply to me peculiar emergencies of that eventful period.

Hence ſuch ſupplies, even after they had become ſtill retained the ancient name of aid and benevolence what is more material, hence, too, the national commu ciſed the power of judging of the cauſe and meaſure grant.[b]

By what rule national ſubſidies were paid.

DOWNWARD till the civil wars between Charles I. a parliament, the landholders paid their proportion public ſubſidies or tax to government agreeably to

[b] Thus, in the indenture between the Robert Bruce and the parliament, he *petiit abiiſdem . . . placeret eis, ex ſua debita gratitudine . . .* and they conſidering *petitionem eſſe rationabilem atque juſtam . . . gratanter et benevole conceſſerunt et dederunt, &c.* See this famous document in lord Kames' Hiſtorical Law Tracts, App. No. 5.; and in the Appendix to Dr. Stuart's Pub- lic Law and Conſtitutional of Scotland. It is alſo larger in the Eſſay on the Origin ar ture of European Legiſlature Tranſ. Vol. i. p. 150, with a the evidence it affords in the ing queſtion concerning the tuent members of the nation blies, under the ancient Got ſtitutions.

; i. e. the valuation of lands that, on the occaſion mentioned, had taken place in the reign of Alex- III. § 1. HISTORICAL VIEW.

the caſualties of ſuperiority were paid agreeably to a rent valuation, called the *new extent*. The *retours* of (or verdict of the jury reſpecting the right of the heir eed to his anceſtor's eſtate), therefore, always ſpecify y the old extent *quantum valuerunt tempore pacis*, that he reign of king Alexander III, but the new extent n nunc valent. But no ſubſequent valuation could main a true ſtandard of the preſent value. The act 56, therefore, required recourſe to ſpecify, "not only the land was of avail of the auld, but alſo, the very an it was worth and gives the day of ſerving the ſaid ." By what rule caſualties of ſuperiority were paid. New extent. What recourſe to ſpecify. Old and new extent.

, wherever lands had once been eſtimated in obedience ſtatute, it became cuſtomary, on every ſubſequent oc- to inſert the ſum mentioned in the former retours of *valuers* and where there were no retours ſubſequent 4, c. 56, the new extent was uſually fixed by quadru- he old, and called, on that account, the *fourth mail*[e]. Fourth mail.

ING the ſtruggles between king Charles and his par- y there were impoſed, by authority of the latter, y aſſeſſments, according to a new valuation made by ſioners appointed to inquire into the "true worth of New valuation.

half of all taxations on land ble from the church lands, never having been valued temporal lands, were aſſeſſ- bly to the value of the ſeve- lces as they ſtood upon a roll gimont's roll. es III, parl. 7.

[e] Preſident Balfour ſays, "generallie ane merk of auld extent ſould be eſtimit to ane pound of new extent." (Pract. p. 430.) Mr. Wight thinks it probable that different proportions were obſerved in different counties. (Syſtem of the Law concerning Elections, &c. B. iii, c. 2, p. 263.)

§ 1. HISTORICAL VIEW.

all rents to landward, as well of lands and tiends as of any other thing whereby an yearly profit in commodity ariseth[f].

Cromwell's plan.

BY two acts of Cromwell's parliament, imposing taxation upon Scotland, every shire was burdened with a certain sum of the general assessment; it was to be proportioned by the commissioners among the several landholders, according to the rates at which the respective landholders were valued.

Every shire.

Old extent finally laid aside.

THE old extent, however, was made the rule of levying the assessment laid on by the act of convention 1665. But only two years after, it was finally laid aside, the new tax imposed by the convention 1667 being raised by affecting each county nearly in the same proportion which had been fixed by Cromwell.

Commissioners directed to rectify former valuations.

THE commissioners were directed, in proportioning the tax, to proceed according to former valuations, where they appeared equal and just, and to rectify them where they appeared to be erroneous, and also to make new valuations where estates had been dismembered and conveyed to different proprietors. The rule laid down by this act has ever since been followed.

—VALUED RENT.

THE rent fixed by those valuations is called the *valued rent*, in contradistinction both to the old and new extent; and with us, as the valuation 1692 in England, has ever since remained the rule of assessment.

[f] The various statutes to this purpose, passed betwixt the period of 1640 and 1650; and the proceedings of the commissioners, appointed by one of these acts, parl. 1649, c. 21, particularly those appointed by the shire of Banff, remain among the records of the lower parliament house.

[g] And those entitled to be valued are freeholders whose lands are rated at 400l. Scots in the valuation-books of the county, as well as those who are possessed of a retour of 40s. old extent, or according to the said valuation of Alexander III.

§ 1. HISTORICAL VIEW.

Articles of the Union.

ıe article 9th of the Union, it is provided, that when- : ſum of 1,997,763l. 8s. 4½d. ſhall be raiſed by the : in England, that Scotland ſhall be charged by the t with a farther ſum of 48,000l. free of all charges, uota of Scotland, to ſuch tax, and ſo proportionally greater or leſſer ſum raiſed in England, by any tax and other things uſually charged, together with the nd that ſuch quotas for Scotland, in the caſes afore- raiſed and collected in the ſame manner as the ceſs in Scotland, but ſubject to ſuch regulations in the of collecting as ſhall be made by the parliament of ſritain.

ɔRDINGLY, acts of ſupply laying that ſum of 47,954l. upon Scotland, by an eight months ceſs of 5994l. 5s. the month, have, ever ſince the Union, been paſſed ill the 38th of his preſent majeſty, which made the t perpetual.

--38GEO.III, PERMANENT,

ıe laſt ſupply act, (38 Geo. III, c. 5), 47,954l. 1s. 2d. lered to be levied by an eight months' ceſs of 5,994l. . ſterling per month, out of the land rent of Scot- r the year 1798; and c. 60 enacted, that the ſeveral pective ſums of money charged by virtue of ſaid act, continue and be levied and paid yearly to his majeſty, s, and ſucceſſors, from the 25th of March in every r ever, but under redemption; and the proviſions and ns contained in the former act, ſo far as not altered atter, were to remain in full force as if particularly d and re-enacted. This ſum, therefore, of 47,954l. thus made a perpetual burthen on the country, is , one part by the boroughs, and another by the coun- ſtewartries.

§ 2. IN THE BOROUGH.

IN the boroughs, the tax is collected by ſtentmaſters, ɔriginally, were appointed by the whole inhabit-

§ 2. IN THE BOROUGH —WHO ASSESSES.

ants[k] of the borough. Afterwards they were choſen by town-council[l]. But, by the convention 1667, and all ſubſequent ceſs acts, they are to be choſen by the magiſtrates.

—STENTMASTERS, THEIR DUTY.

THE duty of the ſtentmaſters is, "to ſtent their neighbours[k];" or, "to ſet the ſtent upon the burgeſſes and inhabitants, and to make a ſtent-roll thereupon as effeirs[l]."

—RULE OF ASSESSING.

THE rule laid down is, "that every perſon within burgh ſhall be taxed and ſtented according to the availl and quantity of his rent, living, goods, and gear, which he hath within burgh[m]." By the firſt, is meant the rent of houſes; the ſecond, the profit of trade or of a calling; and the laſt explains itſelf.

THUS, within borough the inhabitants pay land tax according to their ſuppoſed perſonal property[a].

[k] The act James VI, parl. 15, 1597, c. 281, directs letters to be direct, charging all and ſindrie inhabitants of ilk burgh to convene and elect certaine perſons to ſtent their neighbours.

[l] 1633, c. 2.

[k] 1597, c. 281.

[l] Act of convention, 1667.

[m] Ibid.

[a] About the time of the Revolution, the land tax paid by the city of Glaſgow was levied in the following manner: When this tax was eight months ceſs, there was exacted of it from the proprietors of houſes 10 per cent. of the groſs rent payable to them, which commonly amounted to about one half of the land tax, and the remainder was paid by the merchants. But this 10 per cent. of groſs rent being fixed upon the holders as the conſtant rule, by enlargement of the town, ſufficient for the whole land, and by this means it came, that many years the traders were free from paying any proportion of land tax.

Proprietors of houſes within city of Glaſgow brought a [illegible] declarator, concluding, "that practice of laying the whole [illegible] upon the landed intereſt, exempting altogether the trading intereſt, legal and oppreſſive; and that the traders ſhould be liable two-thirds of the land tax, the profit of the trade of Glaſgow much more than double the rent

THE other moiety is raiſed from the counties, and the ſubjects valued by the commiſſioners appointed § 3. SHIRE.

s. The defence was, that ntion of the royal boroughs v power to divide the whole ceſs, payable by the bo- upon each reſpective bo- cording to their diſcretion; he magiſtrates of each bo- re power, according to their , to ſtent and proportion the their inhabitants; that ſuch ary powers cannot be chal- afore the court of ſeſſion, footing merely of inequali- would be denying the ma- have diſcretionary powers, fore that this declarator can- ſtained, until it could be that the proceedings of the s were partial and unjuſt, there is not the leaſt ap- in the preſent caſe. It was hat not only the houſes and likewiſe the burgeſſes, in their trade and manufac- liable in payment of the that the magiſtrates and -maſters ought to rate the the heritors and burgeſſes ly.

agiſtrates, during the pro- chending the cauſe would them, altered their mea- r, as to direct the ſtent- ppointed for levying the 1758, to lay one-fourth trade, and three-fourths up- ſes. But the landholders, g this as ſtill an unequal applied to the court, after the foregoing decree, pray- he proportion to be paid by each ſhould be aſcertained. But it was conſidered "neither neceſſary nor proper for the court to give more particular directions to the magiſtrates of Glaſgow for proportioning the ceſs betwixt the heritors and other burgeſſes, than what is contained in their interlocutor. (Kames' deciſions, V. iii, 15th June 1759, No. 154.)

Lord Kames, who reports this deciſion, did not approve of it; on this principle, that from the beginning the method of levying the ceſs within boroughs has been to tax individuals, and not claſſes or ſocieties.

Magiſtrates have no power by law to allocate the land tax, whether equally or unequally, upon houſes and upon trade. The commiſſioners for a ſhire have ſurely as extenſive powers as the magiſtrates for a borough. Yet the former never pretended to ſplit the ceſs betwixt the nobility and gentry, nor to allocate ſo much of it on each particular pariſh. If the magiſtrates of a burgh can, by their own arbitrary will, without having any rule, divide the ceſs betwixt the proprietors of houſes and thoſe who live by commerce, they may ſubdivide it betwixt the manufacturers and traders, or order it to be laid on by quarters of the town. In a word, the magiſtrates cannot give any lawful inſtruction to the ſtent-maſter other than to make a ſtent-roll, valuing the rents, living, goods, and gear of each individual." (Ibid.)

§ 3. SHIRE. by the act of convention 1667, that is, land or ſubjects connected therewith yielding a yearly revenue.

—WHAT PAYS CESS? By the act 1649, the ſubjects to be valued and aſſeſſed were, "money rent, victual rent, caſualties paid by tenants, and caſual rent of coals, ſalt, and ſalmon fiſhings, and other fiſhings whereby there is an yearly profit." But, by an unprinted act, parl. 1681 [b], it was declared that coal and ſalt is not to bear any part of the ſupply. Temporary rights, therefore, bear no longer any part of the tax, which reſts upon perpetual rights alone. But as the ſum impoſed upon each ſhire was made unalterable, that part of the tax which was originally laid upon temporary rights muſt have been added to the tax laid on the perpetual rights by the commiſſioners of ſupply [c].

'Temporary rights?

UPON the ſame narrative, that "by the ſupply lately granted, the lands rents and boroughs of this kingdom are only burdened; and it being reaſonable that perſonal eſtate in money ſhould bear ſome proportional burden, the 6th act 1706, c. 2, and the ſubſequent Britiſh ſupply acts, do inſtitute and ordain, that every debtor owing money within the

[b] The king's majeſty, and eſtates of parliament, taking to their conſideration ſeveral petitions addreſſed to them, complaining of the inequalitie of the valuation of lands in diverſe ſhires, ſeveral lands being exorbitantly valued, and others far below the true value, doe hereby authorize the lords of his majeſtie's privie councel, upon application to be made to them by the commiſſioners of ſupply in any of the ſhires, or major part of them, to grant warrand and commiſſion to the commiſſioners of ſupplie or exciſe, or ſuch others as they ſhall think fitt, to take tryel of ſuch inequal valuations, and the tryel to revalue and reſtrict the valuation of the ſhire: And it is hereby declared, that coal and ſalt is not to bear any part of the ſupplie, providing always that the total of the ſhire be keeped entire, without diminution; and his majeſtie's privie councel are hereby authoriſed to name and appoint commiſſioners of exciſe or ſupplie in the ſeveral ſhires as they ſhall find cauſe, upon application of a quorum of the commiſſioners.

[c] Kames' Dec. V. iii, p. 49.

gdom at ſix per cent. of intereſt ſhall, in the payment of annualrents, have retention in his own hands of a twelfth of ſix per cent. this retention to be from the term of rtinmas next to come to ." A ſtrong proof he inclination to adhere to old phraſeology; as the legiſ- e here provides for what, if it exiſted, would be ſeverely iſhable as uſury. But the clauſe never appears to have carried into effect. § 3. SOMEWHAT PAYS?

n England, the land tax is raiſed, *1ſt*, on perſonal eſtates he extent of 4s. in the pound, viz. 20s. for every 100l. oney or goods of that value. *2dly*, On offices and penſions he extent of 4s. for every 20s. yearly income. *3dly*, On eſtates, including every ſpecies of property or income ng out of, or connected with land. And, therefore, ly acts are, ſince that time, annually paſſed, for raiſ- the ſame rate as formerly of 4s. in the pound, viz. r for every 100l. of perſonal propery, and 4s. in the d for every 20s. of offices and penſions. But theſe acts ſo far from extending to Scotland, that they contain the ſe inſerted in the former land tax act, viz. "that this ſhall not extend to the inhabitants of Scotland, Ireland, ey, or Guernſey, for aſſeſſing any ſuch perſonal eſtate ch they, or any to their uſe, have within thoſe places, for towards the ſaid ſum hereby charged upon England, s, and Berwick-upon-Tweed, as aforeſaid." In England.

VI. AT a period of great moment and difficulty, it was ged proper to paſs a ſtatute for the redemption of the d tax; a meaſure of policy, which propoſes at once to mote the intereſt of the individual and of the public [d]. e ſtatute 38 Geo. III, c. 60, which introduced, and ſubſe- nt ones [e] which corrected and explained, this meaſure, § 4. REDEMPTION.

[d] See Mr. Harriſon's Analyſis of Act 38 Geo. III, c. 60.

[e] 39 Geo. III, c. 6 and 21; and 41 Geo. III, c. 72.

§ 4. REDEMPTION. were all repealed by the 42 Geo. III, c. 116, which appears to have attained all the perſpicuity and preciſion that can be expected in a thing of ſuch variety and extent.

THE particular explanation of this ſtatute, which, of itſelf, makes a volume, and, with Mr. Harriſon's explanation, is furniſhed by government to thoſe called officially to act under it, would be improper here. But, not to appear to overlook entirely ſo important a matter, though of temporary concern, the duty of the reſpective officers, in the execution of it, may be briefly mentioned.

—COMMISSIONERS FOR ITS EXECUTION. How choſen. COMMISSIONERS for executing the act are appointed under the royal ſign manual. They are choſen by his majeſty from the commiſſioners of ſupply of the reſpective counties[f].

THEIR various duties, as well as thoſe of the receiver general, commiſſioners of the affairs of taxes, commiſſioners for the reduction of the national debt, under the ſtatute, are particularly ſtated therein, and ſhall not here be repeated.

Deſcription of the land. PERSONS intending to redeem their land tax, are directed to produce a ſchedule, or deſcription in writing, of the lands, or other property, the name or names of the occupiers thereof, and the pariſh or place where they are ſituated, to any two commiſſioners of ſupply, or to the chief magiſtrate of the city or borough, who ſhall adjuſt the amount of the land tax charged upon the reſpective lands, or other properties contained in ſuch ſchedule, diſtinguiſhing according to the form and method in the ſchedule annexed to the ſaid act, and marked (A.) the diſtrict or diviſion, and alſo the pariſh or place within which, and the lands or other property upon

Adjuſt the amount of the land tax.

[f] 42 Geo. III, c. 116, § 5. [g] § 17.

each ſeparate aſſeſſment of land tax ſhall be charged, § 4. REDEMPTION —42 G. III. C. 116.
ll grant a certificate thereof [h].

commiſſioners of ſupply are farther directed to ad-
proportion of land tax to be borne by proprietors of
n rents, feu-duties, or other rents, or any tenements Fee-farm rents, &c.
ditaments which have not diſtinctly been aſſeſſed to
l tax; and, on their production of their certificate,
nmiſſioners for redemption may contract for the

r muſt continue to inſert, in the certificates of aſſeſſ-
he whole of the land tax charged on any place or
notwithſtanding the diſcharge of any part thereof,
redemption of the whole thereof; and they are to
from the officer of commiſſioners for the affairs of
duplicate of the land tax redeemed or purchaſed [k].

in caſe of any land tax again recurring, and becom-
geable on any lands, &c. the commiſſioners of land
upply, or chief magiſtrate within borough, are re-
within ſix calendar months after ſuch land tax ſhall
vived, to deliver, or cauſe to be delivered, a ſchedule
icate in parchment under their hands and ſeals, to
iver general for the county, riding, diviſion, or place,

[h] (A.) Form of the cer-
e of the amount of the land
nd the lands upon which it
ſſed.
nd C. D. two of the com-
of land tax acting for the
in the county of
do hereby certify that the
fly deſcribing the lands and
nts chargeable] are charg-
ed with land tax to the amount of
[and if more parcels of land
tax than one, repeat the deſcription,
and that the meſſuage and lands,
[briefly deſcribing the ſame], are
charged in like manner to the a-
mount of making in the whole
the amount of .]
[i] § 35.
[k] § 74.

§ 4. REDEMPTION —42 a. III, c. 116.

or to the receiver general; and ſhall tranſmit, or c be tranſmitted, a like ſchedule or duplicate into the of exchequer, which ſchedule or duplicate ſhall conta ſpecify the amount of the tax ſo revived and again b chargeable, and the year in which, and the perio whence ſuch land tax ſhall have been revived. And i ſuch land tax ſhall have been revived, from any peric ceding the commencement of the year in and for whic ſchedule or duplicate ſhall be made out, ſuch ſche duplicate ſhall alſo ſpecify the amount of the arrears c land tax, upon the commencement of ſuch year as afo diſtinguiſhing the amount of the land tax ſo revive again become chargeable, from the amount of ſuch as aforeſaid [l].

IN caſes of abatement, they ſhall make an aſſeſſmen cifying ſuch abatement.

Commiſſioners of appeal.

COMMISSIONERS for appeals muſt be commiſſion ſupply, as alſo juſtices of peace for the county [m].

ANY perſon aggrieved by any determination of the miſſioners, with relation to the redemption or purch any land tax, where the conſideration ſhall not exceed ſtock, may appeal to the commiſſioners of appeal at th petty ſeſſions, and their order ſhall be final [n]. Comm ers of appeal may have the advice of counſel, who are paid by the party who loſes his cauſe; and the comm ers have power to award coſts. Where the conſider again, exceeds 500l. ſtock, the appeal is by ſummary cation to the court of ſeſſion or exchequer. The pa of the ſums awarded may be enforced by diſtreſs and

—JUSTICES.

JUSTICES of peace alſo have certain functions comm

[l] § 148. [m] § 196. [n] § 197.

om in the execution of this act. By ſection 46th it is § 4.
ed, that the land tax on lands mortified to charitable REDEMPTION
ſes may be redeemed out of the poor rates, with the —42 G. III,
bation of two juſtices; as may alſo truſt property for c. 116.
nefit of any place be applied in redemption of the land
on lands ſettled for the benefit of ſuch place, which
e charged with the annuity equal to the truſt property
plied; ſuch application and charge of annuity being
with the approbation of the juſtices [o].

D by ſection 190 it is provided, that penalties not ex-
ng 5ol. (other than to the party aggrieved) may be ſued
fore any two juſtices for the bounds, who ſhall hear Two juſtices.
etermine the matter; they are required and authorized,
any information exhibited, to ſummon the party, and
e witneſſes on either ſide, and upon due proof, either
luntary confeſſion of the party, or by oath of one or
credible witneſs or witneſſes, to give judgment; and One witneſs.
may iſſue their warrant for levying the ſame on the
of the party, and commit him to priſon for ſix months, Execution.
the goods belonging to him cannot be ſufficient for
ring the penalty. An appeal is competent to the next Appeal.
e ſeſſions, on giving ſecurity to the amount of the pen-
nd forfeiture, and alſo of the expences which may be
ed in caſe the judgment be affirmed, who are finally
r and determine the matter.

the next quarter ſeſſion ſhall be within ſix days after
ion, the appeal may be made to the next ſubſequent
e ſeſſions [p].

witneſſes neglect to appear, or refuſe to give evidence,
ſo offending ſhall forfeit 40s. for every ſuch offence [q].

[o] § 46, 47. [p] § 190. [q] § 191.

§ 4. REDEMPTION —42 G. III, c. 116.

AFTER the six months, no penalty or forfeiture (oth than to the party aggrieved) shall be afterwards recov able, except in the name of his majesty's advocate in t court of exchequer; the whole penalties to belong to majesty.

LAND tax under 25l. may be redeemed by a considerati in money, to be ascertained by certificates to the receiv general of the price of stock in the week preceding. A stock above 25l. can be redeemed only by transferring stock [a].

§ 5. PROPERTY TAX.

V. BEFORE closing this subject, it may be observed, th by the ninth article of the treaty of Union, the land tax Scotland was to bear a proportion to that of England 48000l. is to 1,997,763l. 8s. 4½d. and that any future lan tax was to be apportioned in the same manner.

BY an act 39 Geo. III, c. 13, certain duties were laid u on income, including the rents of land; which act was afte wards repealed by 42 Geo. III, c. 42; and a new tax h been laid upon property of every kind, including land, t take place during the present war with France, by 43 Ge III, c. 122. The execution of this act being left to commi sioners, chosen in a certain manner, it does not fall with our present plan to take notice of the different regulation therein contained. Neither has it been supposed that th above recited article in the treaty of Union is applicable t any temporary imposition of this kind, laid upon income o property in general.

[a] By an account laid before parliament, it appears, that 21,794,307l. had been transferred to the commissioners, on account of the land ta redeemed in Great Britain previous to 1st February 1805.

CHAP. II.

Of the Dividing of Valuations.

§ 1. IN GENERAL.

THE dividing of valuations is one of the principal departments belonging exclusively to commissioners ıpply. The nomination of these magistrates, their quaıtion, appointment of their clerks, times and place of meeting, quorum, and other matters, pertaining either ıe general nature, or to the correct and regular execuof their office, have been already taken notice of[a]: e, therefore, only such things remain to be mentioned as ıecessary to the proper division of valuations.

s already mentioned, in place of the old method of taxı, not only the whole lands of the kingdom, whether l of the king or of a subject, but also all real rights reıg to lands, feu-duties, teinds, mines, fishings, were va-. And the direction of the convention 1643, and of equent enactments, was to value the whole of every 's taxable subjects *in cumulo*, that is, together. Lands,

Valuation by convention 1643.

[a] Vol. I, p. 325.

§ 1. IN GENERAL.

therefore, and other rights above mentioned connected there with, were never valued ſeparately, unleſs they happened to belong to different proprietors.

IN a new method of levying the land tax, tried by way of experiment merely, this was adopted as moſt expeditious. This new method was found to anſwer, and followed on by ſubſequent parliaments.

Its inconveniences.

HOWEVER, numberleſs re-valuations ſoon became neceſſary. The value of temporary rights was perpetually varying. And when different ſubjects which had once been valued *in cumulo* paſſed to different proprietors; when, for example, a colliery or fiſhery was ſold to one, and the land either retained or ſold to another, it was neceſſary to value them ſeparately.

Re-valuation why neceſſary? On two accounts.

Remedy to the inconvenience of *cumulo* valuations.

IN order to remedy this inconvenience, by act of convention 1667, on the narrative, "that where lands, teinds, or other real eſtate did, the time of former valuations, pertain to one perſon, and are ſince diſmembered and diſponed to ſeveral perſons in parcels, ſo that the value of each parcel in itſelf cannot be known from former valuations," the commiſſioners are empowered "to value of new again, provided no alteration be made of the total ſum impoſed on the ſhire."

Nominal and fictitious votes.

BUT theſe re-valuations became ſtill more frequent from political zeal, which put landholders upon the deviſe of ſplitting their valuations, with the view of creating nominal and fictitious votes.

§ 2. AT WHAT MEETINGS CAN A VALUATION BE DIVIDED?

II. THE commiſſioners cannot divide a valuation, unleſs either on the day of their firſt meeting, named in the act, or at a meeting of adjournment, or at a regular meeting

ſummoned by the convener[b]. But if a diviſion, made by a private meeting, be confirmed or homologated by a ſubſequent legal meeting of the commiſſioners, it will be thereby validated[c]. § 3. AT WHAT MEETING.

IN one particular caſe, a diviſion of valuation was ſuſtained, though made at a meeting held on neither of theſe days[d].

III. THE application is made by a petition, ſtating the amount of the total, or *cumulo* valuation, and praying for a § 4. PROCEDURE.

[b] Wight, p. 193. 21ſt Feb. 1753, Abercrombie againſt Leſlie.

[c] 6th March 1754, Campbell againſt Stirling and others.

[d] A diviſion of valuation was made by a decree of the commiſſioners of ſupply, and one of the parts being valued at 400l. Scots, the proprietor thereof was enrolled at the Michaelmas head court. This enrolment was complained of, on the ground that the decree was pronounced by an irregular meeting, being neither the firſt meeting appointed by the act, nor a meeting by adjournment, nor a meeting appointed by the convener. There was, however, a ſpecialty. The land tax act of 1751 had appointed the 4th of June that year for the firſt meeting of the commiſſioners. That day was paſſed before the act came down; and, as ſoon afterwards as poſſible, the ſheriff convened the commiſſioners. The complainer replied, that what paſſes in the houſe of commons is preſumed to be known to all the lieges, and that the commiſſioners, therefore, had authority to meet upon the 4th of June, though the printed act had not then come down. The court of ſeſſion, however, deemed the printed act the proper legal intimation, as it was reckoned abſurd that the neglect of publiſhing the act ſhould be productive of a conſequence ſo violent as that of freedom from the land tax; and they did accordingly repel the objection.

"I was not," ſays lord Kames, "ſatisfied. The land tax is a debt which, in all events, ought to be levied; and if it cannot be done in the regular way, another method muſt be ſubſtituted. The extraordinary powers of the commiſſioners are to be conſidered in a different light. No meeting is empowered to ſplit a valuation, but what is regular, in terms of the ſtatute. And if ſuch a meeting cannot be had, there is no ſuch neceſſity in this caſe, as in the former, to apply a remedy. No loſs enſues, ſave only a year's delay in ſplitting the valuation." Innes of Sandſide againſt Sutherland of Swinzie, 26th June 1753. Kames Rep. V. iii, p. 56.

§ 3. PROCEDURE. division of it among the different lands to which it is applicable, in order that the particular valuation of each may be separately ſtated in the ceſs books. The commiſſioners upon this allow a proof of the real rents of the ſeveral lands, and grant their warrant for ſummoning witneſſes to appear at an after meeting, to which they may adjourn. If witneſſes decline appearing, an application may be made to the judge ordinary, who grants warrant of courſe. On that diet they proceed to take the proof, after which they generally remit it to their clerk to ſplit the valuation accordingly; and, approving of his report, they ſet forth in their decree the ſeparate value of each parcel, and order the ſame to be ſtated in the ceſs book, and the ceſs, i. e. land tax, to be levied accordingly in time to come. Sometimes the commiſſioners appoint a committee of their own number to take the proof, and to give in a report to a ſubſequent meeting[e].

Proof allowed.

Taken.

Decree.

Inſertion in the ceſs books.

Who muſt be called in an action of damages.

IN a proceſs of valuation, it is neither neceſſary to call the tenants, even although, by their tacks, they may be bound to pay the ceſs; nor the ſuperior, although his political intereſt may be ultimately affected[f]; nor the vaſſals, even although they pay the land tax[g].

THIS ſubſtantial intereſt of the latter, however, entitles them to bring an action for ſetting aſide the valuation on the ground that it is wrong and illegal.

§ 4. PROOF REQUISITE. IV. THERE are three methods of dividing a *cumulo* valuation. Firſt, the real rent of the ſeveral parcels at the time when the valuation was made. Secondly, the uſe of paying the ceſs. Thirdly, the preſent rent.

Three ſorts.

[e] Wight Election Law, p. 184.

[f] July 24, 1760, Hume againſt Broomfield.

[g] Dec. 6, 1780, ſir Walter Montgomery Cunningham againſt Hamilton of Sundrum.

firſt is undoubtedly the moſt accurate method, and § 4.
PROOF.
ra to be preferred where evidence can be had. When
l rent in Scotland was valued, in order to lay on the
s *cumulo* valuation of each man's property within a
ras undoubtedly aſcertained from a view of the rent
each farm, and, conſequently, each farm bore a part
cumulo valuation in proportion to the rent then paid.
diſtance of time, it becomes impracticable to aſcer-
original rent, the commiſſioners muſt then recur to
he other methods.

next rule is, the uſe of paying the ceſs, which, if of —USE OF
PAYMENT.
ſtanding, is preſumptive evidence of the original rent,
the uſe of payment is commonly aſcertained from
rent.

moſt exceptionable method is the preſent rent, which
uncertain rule by the fluctuation in the value of eſ-

r was mentioned above, that, at one period, the moſt § 5.
REVIEW OF
DUTY.

he caſe, (ſays lord Kames),
ms of the ſame extent and
rent, which, belonging to
heritor at the time of valua-
e valued *in cumulo* at 800l.
ns are feued out, and each
ertakes, as he ought to do,
ſponding to 400l. valuation.
eſe feus, in proceſs of time,
improved, the other not at
hich means the preſent rent
two feus is very unequal.
rior diſpones the ſuperiority
n which is improved; and
eſent rent were to be the
iviſion betwixt the vender
haſer, the former would
vote, becauſe ſo much as the
purchaſer's feu is valued above 400l.
ſo much under it muſt the other be
valued. And yet had there been a
regular diviſion, while the memory
of the original rent remained, both
muſt have been entitled to a vote.
(Deciſions, V. iii, p. 102, No. 76;
17th Jan. 1755, Campbell of Monzie
againſt the freeholders of the county
of Stirling.) The valuation of Mr.
Campbell's lands was divided by a
proof of the payment of the ceſs. It
was objected, that the commiſſioners
had done wrong in dividing by the
uſe of payment of the ceſs, and not
by the preſent rent. The court "re-
pelled the objection."

§ 5. REVIEW OF DUTY.

frequent application for dividing valuations proceeded from political views. But the commiſſioners of ſupply being generally freeholders, were deeply engaged in the ſame controverſy. They came, therefore, to imagine, that ſuch applications, not made in the courſe of real buſineſs, but mere political devices, might be lawfully counteracted and baffled with the ſame views. Hence, what, in this country, happily occurs not in the hiſtory of any other public functionaries, is very frequently taken notice of by Mr. Wight, in his account of the commiſſioners of ſupply, viz. *packed meetings to ſerve a job.* But commiſſioners of ſupply ought to diſcharge their public duty without attending to ſuch conſiderations.

May the commiſſioners refuſe to divide?

IF commiſſioners of ſupply, therefore, refuſe to divide valuations when regularly applied to, or to fix a meeting for that purpoſe, or to diſcharge any other branch of duty, redreſs is to be obtained from the ſupreme civil court. A ſmall eſtate in the ſtewartry of Kirkcudbright, conſiſting of many parcels of houſes, acres, &c. being ſplit amongſt a number of purchaſers, they petitioned the commiſſioners of ſupply to divide the total valuation, for the purpoſe of aſcertaining what proportion of land tax each of them ought to pay. The commiſſioners, unwilling to ſplit the land tax payable for the whole into ſo many fractions, refuſed the petition; but the matter being brought before the court of ſeſſion, the convener was appointed to call a general meeting, in order to divide the valuation amongſt theſe ſeveral purchaſers [1].

1 4th Auguſt 1757, Malcolm and others againſt commiſſioners of ſupply for the ſtewartry of Kirkcudbright. Wight, p. 186.

Another inſtance occurred, nine years after, in the ſhire of Angus. The late earl Panmure, by twenty-two ſeveral diſpoſitions, or feu-rights, conveyed as many parcels of his eſtate to his brother Mr. baron Maule, for the yearly payment of a trifling feu-duty for each parcel; and having thus diveſted himſelf of the property, obtained a new charter from the

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town, upon his own reſignation in favour of himſelf, his heirs and aſſignees; after which, he granted conveyances to twenty-two different perſons in liferent, and to himſelf in fee, of the ſeveral lands formerly feued out to his brother. Theſe liferenters, after being inſeft upon the exception in the earl's charter, applied to the commiſſioners of ſupply to divide the earl's *cumulo* valuation as might fall to them, in proportion to the old rent of the lands ſeverally conveyed to them. The commiſſioners refuſed their petitions, upon the preſumption that a diviſion into ſo many parts would occaſion great and unneceſſary trouble, and render the payment of the land tax more difficult and precarious; and that they were not bound to give encouragement to proceedings that were carried on with no other view than to create a number of nominal and fictitious votes, contrary to the principles of the conſtitution, and to the expreſs enactment of many ſalutary laws. The petitioners upon this applied to the court of ſeſſion, by bills of advocation, and obtained an order in the following words: "The lords refuſe the advocate; but remit to the commiſſioners of ſupply to aſcertain the value of the complainer's lands, by joining the ſame in the ceſs books with the *cumulo* valuation of the lands with which they ſtand preſently valued; and appoint the convener with the commiſſioners to call a meeting as ſoon as convenient for that purpoſe." And the commiſſioners having afterwards thrown freſh obſtacles in the way, the court, upon a new application, pronounced another order, in the following words: "The lords having heard this petition, they appoint the commiſſioners of ſupply for the ſhire of Forfar, or any five of their number, to meet at the town of Forfar, in the place where their meetings are commonly held, upon Thurſday the 12th inſtant, by 10 o'clock forenoon, and no ſooner, and to proceed directly to expedite the diviſion of the valuation of the ſeveral lands wherein the petitioners ſtand infeft; and in order that the ſame may not be diſappointed or poſtponed improperly, appoint the ſaid commiſſioners, or their quorum aforeſaid, at their ſaid meeting, to take proof of the real rents of the ſeveral lands which the petitioners ſhall inſiſt are neceſſary to be proven, by examining ſuch witneſſes as the petitioners ſhall, upon that occaſion, adduce before them, who, if any objection is made, are, notwithſtanding, to be examined, reſerving the conſideration of the objections till the diviſion comes to be judged of. And after the proof is taken, appoint them immediately to proceed to determine upon the import of it, and make the diviſion accordingly; and if the commiſſioners ſhall find it neceſſary to adjourn their meeting, by reaſon that a quorum of five of their number cannot be got to continue together till the affair is concluded, the lords in that caſe allow, authorize, and appoint the adjournment to be made to the firſt day thereafter, that any five of the commiſſioners ſhall declare their willingneſs to attend, who, in that caſe, are appointed to meet at the ſame place and hour, and to proceed in the ſaid matter with diſpatch.

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And if any further adjournment or adjournments are found neceſſary, for the want of a quorum willing to ſit longer, appoint the other adjournments to be made according to the rule above directed, and diſcharge (i. e. prohibit) every other buſineſs to be taken up by the commiſſioners at the ſaid meetings until the diviſion of the petitioners valuations is concluded; and declare, that no adjournment, made by the majority of any meeting, ſhall hinder any five of the commiſſioners to proceed who are willing; and, in the laſt place, appoint the clerk, by himſelf or a depute, for whom he ſhall be anſwerable, to attend the meetings regularly, while a quorum of five commiſſioners continue together on the ſaid affair." 15th Nov. 1766, earl Panmure, &c. againſt the commiſſioners of ſupply for the county of Forfar. This judgment was affirmed in the houſe of lords, 10th Feb. 1767, with 200l. coſts. Wight, p. 188.

A ſimilar order was given upon the 18th Dec. 1772, relative to a diviſion of the duke of Gordon's valued rent in the county of Banff. The commiſſioners, accordingly, met upon the appointed day, but the majority, after ſtating certain objections, ſtopped further procedure. The minority, however, went on, and made a diviſion; and the court of ſeſſion juſtified their conduct, by finding that they were authorized to proceed in reſpect that the majority did not do ſo. But, if the majority had proceeded to make a diviſion, that diviſion, however erroneous, muſt have been the rule till rectified.

Another caſe, of a like nature, occurred at the time of the general election in 1780. It was, however, attended with a peculiarity that gave riſe to a warm conteſt. William Brown, having acquired certain lands in the county of Ayr, neglected to get their ſeparate valuation aſcertained, till within twelve days of the election for that county, which was held upon the 16th Oct. 1780. Upon the 4th of that month, he applied to the convener to call a meeting of the commiſſioners of ſupply for that purpoſe, and inſiſted that it ſhould be held upon Friday the 7th. The convener, who was in a different intereſt, anſwered, "That he was very willing to call a meeting of the commiſſioners as required, but that it was impoſſible for him to call it ſo ſoon as Friday firſt, as he had never been in uſe of calling any meeting without previouſly advertiſing it in the Glaſgow papers; and as he could not have an opportunity of advertiſing a meeting ſooner than in the Glaſgow papers of the 13th October inſtant, he ſhould take care to have it advertiſed that day, to be held at Ayr on Wedneſday the 18th inſtant." Mr. Brown and ſome others, in like circumſtances, complained to the court of ſeſſion by bill of advocation; and on the 7th of the month, the judge officiating on the bills pronounced the following deliverance: "Having conſidered the within bill, petitions, and proteſt, in name of the complainers; and anſwers by the convener of the commiſſioners of the land tax for the ſhire of Ayr refuſing to call a meeting of the ſaid commiſſioners as required ſo to do; in reſpect there is not time for appointing this bill to be ſeen and anſwered in common form, refuſes to advocate: but appoints the commiſſioners of ſupply of the ſhire of Ayr,

or any five of their number, to meet at the town of Ayr, in the place where the meetings are commonly held, on Thurſday the 12th of October current, at ten o'clock forenoon and not ſooner, and to proceed directly to expedite the diviſion, aſcertainment, or approbation, of the valuation of the ſeveral lands wherein the complainers ſtand inſeft; and, in order that the ſame may not be diſappointed, or poſtponed improperly, appoints, &c." as in the order reſpecting the caſes from the county of Forfar.

Of this deliverance no intimation was made, either to the commiſſioners at large, or to their convener; nor was there any notice given of it, even to the clerk, till the very hour of the meeting, when a few of the commiſſioners, in the ſame intereſt with Mr. Brown, went into the court room, and in a ſhort time aſcertained his valuation to be 471l. 5s. 2d. Scots, and ordered it to be ſo entered in their books. At the meeting held for the election upon the 16th of the month, Mr. Brown claimed to be inrolled; and, in proof of his being poſſeſſed of the valuation required by law, produced this recent decree. The majority of the freeholders, however, refuſed to inrol him; and upon his entering a complaint to the court of ſeſſion, their judgment was endeavoured to be ſupported chiefly upon the following grounds: "That, although the court of ſeſſion might review the proceedings of the commiſſioners of the land tax, yet here there were no proceedings to be reviewed; the matter that gave riſe to the bill of advocation, being the exerciſe of an office, not the ſentence of a judge; and that, even when there was room for an advocation, ſtill an intimation to the commiſſioners was neceſſary, ſo as that all of them might have an opportunity to attend. In the caſe of Malcolm and others againſt the commiſſioners of ſupply of Kirkcudbright, the convener was appointed to call a general meeting. And in the caſes from the counties of Forfar and Banff, the collective body of the commiſſioners had been regularly brought into court and ordered to meet; and it was only upon their being refractory, that power was given to any five to proceed in the buſineſs; but here no intimation was made to the commiſſioners at large, to acquaint them of the time of the meeting, nor was any notice given either to them or to their convener, of the application made to the court of ſeſſion, upon which the order proceeded." This argument was alſo inforced by an obſervation to the following effect: "That, to give validity to ſuch proceedings, were to open a door for the greateſt injuſtice. A perſon who had a job to carry through at the eve of an election, of which he could not expect the approbation of the commiſſioners at large, would be under no difficulty of effecting his purpoſe, provided the convener was his friend; for, in that caſe, he needed only to get him to refuſe to call a meeting, and then apply to the lord ordinary on the bills for authority to any five of the commiſſioners to proceed; as, in that event, he might keep the whole buſineſs a ſecret from every commiſſioner of the county, except thoſe in whom he could confide, and who might be willing to concur in his ſcheme."

This reaſoning was, however, attended with no ſucceſs. The objec-

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§ 5. REVIEW OF DUTY.

tions made by the freeholders were overruled, and Mr. Brown was ordered to be added to the roll. The reporter of this cafe obſerves, " That ſome of the judges thought that an oppoſite party ought to have been in the field, in order to give validity to the judicial procedure; but as it was not alleged that the con had done any wrong, an had preciſely followed out pointed out by the lord ord court repelled the objectic Dec. 1780, Brown againſt Fac. Coll.)

CHAP. III.

Of Soldiers.

§ 1. IN GENERAL.

'N former times there were no regular armies in the country, wars being carried on by the feudal army, ıonly called the king's hoſt, which were raiſed occa- ly by proclamation; brought proviſions with them for ain time, took the field at once, and encamped; and the time of their ſervice was over, diſbanded, every returning to his own reſidence.

In feudal times.

T in the progreſs of the feudal governments, the mili- ervice, both of the great barons and of their immediate ıdants, came to be almoſt univerſally exchanged for a ent in money, which was employed to maintain thoſe ſerved in their ſtead. Hence, in proceſs of time, a ing army was introduced, firſt in France in the of Charles VII, afterwards in England in the reign of les II.

Firſt ſtanding army in modern Europe.

NDER the conſtitution of Great Britain, indeed, theo- ally ſpeaking, there is no ſtanding army; for although,

§ 1. IN GENERAL.

in reality, the army is not annually disbanded, yet the a consent of parliament is required to keep it in existen it being expressly stated in the declaration of rights, " the raising and keeping of a standing army in time of p without consent of parliament, is contrary to law."

IT is an indispensable requisite to the establishment army, that there should be order and discipline maint therein, and that the persons who compose it should, f offences in their military capacity, be subject to a trial court martial, that is, a court composed of officers.

Mutiny act.

To keep the army, therefore, in order, an act of p ment annually passes " to punish mutiny and desertion, for the better payment of the army and their quarters."

First one.

first regular mutiny act was passed in the reign of king liam[b], for the endurance only of six months. It has, ever, from that time, with the exception of a single in only of three years during the reign of king William, annually renewed by parliament[c].

Its object.

THE object of the mutiny act, therefore, is to cre court invested with authority to try those who are a p the army, in all their different descriptions: and the o of the trial is limited to breaches of military duty, whic all cases of capital punishment, are strictly defined; w in other cases, where the degree of the offence may var ceedingly, more is intrusted to the discretion of the c but the jurisdiction extends to no cases not relating t discipline of the army, leaving other offences and ques to the determination of the ordinary courts[d]. Thus the sent military law is totally distinct from martial law, pro

Different from martial law.

[a] Tytler's Military Law, p. 7.
[b] 3d April 1689.
[c] Tytler's Military Law, p. 111.
[d] Lord Loughborough (earl lyn, apud Tytler's Military Law

ſo called; by which every ſpecies of offence, committed by any perſon who appertains to the army, is tried, and even ſ debts ſubject to inquiry, not by the civil judicature, by the judicature of the regiment or corp to which he nga. § 1. IN GENERAL.

HE mutiny act empowers the king to "form articles of and conſtitute courts martial, with power to try any by ſuch articles, and inflict penalties by ſentence or ment for the ſame." This extenſive power, however, is ed to the making of articles "for the better government he forces;" and, of courſe, can extend to no other caſes ſuch as are thought neceſſary for the regularity and due poſition of the army [e]. Articles of war.

ILITARY law, however, and the powers and duties of rts martial, are foreign to our ſubject. It will be neceſ-, therefore, to conſider only ſuch parts of the mutiny act mpoſe duties on the civil magiſtrate.

. 1ſt, THE king may form articles of war for better nment of the forces, and conſtitute courts martial with r to try any crime by ſuch articles of war; but no per- ſhall be adjudged to ſuffer any puniſhment extending to or limb by the ſaid articles, except for crimes expreſſed ſo puniſhable by the mutiny act. § 2. MUTINY ACT —ARTICLES.

CARE is taken to prevent any perſon from being in- without his deliberate conſent. —INLISTING SOLDIERS.

T is provided, "that, when any perſon ſhall be inliſted a ſoldier for his majeſty's land ſervice, he ſhall, within r days, but not ſooner than twenty-four hours, be carried Within four days. After 24 hours.

[e] Lord-chief-juſtice Loughborough, apud Tytler's Military Law, p. 25.

§ 2. MUTINY ACT —INLIST-MENT.

before the next juſtice, or chief magiſtrate of a town ate, (not being an officer of the army), and, before h be at liberty to declare his diſſent to ſuch inliſting, ſuch declaration, and returning the inliſting money, ing 20s. for the charges expended on him, he ſhall b with diſcharged in preſence of ſuch magiſtrate; b ſhall refuſe or neglect, within twenty-four hours, t ſuch money, he ſhall be deemed to be inliſted, as i given his aſſent thereto before ſuch juſtice or chief m And, if the perſon declare that he voluntarily inli ſelf, the juſtice ſhall read over to him (or cauſe be to him in his preſence) the ſecond and ſixth ſection articles of war againſt mutiny and deſertion, (or h

f (SECT. II.)

Art. 1, Whatſoever officer or ſoldier ſhall preſume to uſe traitorous or diſreſpectful words againſt our royal perſon or any of our royal family, if a commiſſioned officer, he ſhall be caſhiered; if a non-commiſſioned officer or ſoldier, he ſhall ſuffer ſuch puniſhment as ſhall be inflicted upon him by the ſentence of a court martial.

2, Any officer or ſoldier who ſhall behave himſelf with contempt or diſreſpect towards the general, or other commander in chief of our forces, or ſhall ſpeak words tending to his hurt or diſhonour, ſhall be puniſhed according to the nature of his offence, by the judgment of a court martial.

3, Any officer or ſoldier who ſhall begin, excite, cauſe or join in any mutiny or ſedition, in the regiment, troop, or company, to which he belongs, or in any other regiment, troop, or company, either of our land or marine forces, or in any party, poſt, detachment, or guard, on any pretences whatſoever, ſhall ſu or ſuch other puniſhment martial ſhall be inflicted.

4, Any officer, or non-co officer, or ſoldier, who be at any mutiny or ſedition uſe his utmoſt endeavour the ſame, or coming to the of any mutiny, or intende does not without delay gi nation thereof to his com ſuper, ſhall be puniſhed b martial with death, or ot cording to the nature of th

5, Any officer or ſoldier ſtrike his ſuperior officer, offer to draw, or ſhall lift weapon, or offer any viole him, being in the execution fice, on any pretence what ſhall diſobey any lawful co his ſuperior officer, ſhall ſu or ſuch other puniſhment cording to the nature of h be inflicted upon him by the of a court martial.

of those sections as the particular mutiny act may or- §2. MUTINY ACT —INLISTMENT.
der, and administer to him, not only the oath of fidelity mentioned in the said articles of war, but also the oaths appointed by the mutiny act &c.

The justices are thereafter to certify the inlistment in the rolls ordered to the respective mutiny acts [h].

(Sect. VI.)

Art. 1. All officers and soldiers, having received pay, or having been mustered in our service, shall be convicted of having deserted the same, shall suffer death, or such other punishment as shall by a court martial be inflicted.

2. Any non-commissioned officer or soldier, who shall without leave from his commanding officer, absent himself from his troop or company, or any detachment with which he shall be commanded, shall, upon being convicted thereof, be punished according to the nature of his offence, at the discretion of a court martial.

3. No non-commissioned officer or soldier shall inlist himself in any other regiment, troop, or company, without a regular discharge from the regiment, troop, or company, in which he last served, on the penalty of being reputed a deserter and suffering accordingly. And in case any officer shall knowingly receive and entertain such non-commissioned officer, or soldier, or shall not, after his being discovered to be a deserter, immediately confine him and give notice thereof to the corps in which he last served, he the said officer so offending shall by a court martial be cashiered.

4. Whatsoever officer or soldier shall be convicted of having advised or persuaded any other officer or soldier to desert our service, shall suffer such punishment as shall be inflicted upon him by the sentence of a court martial.

And the oath mentioned in the said articles of war, is as follows:

I swear to be true to our sovereign lord king George, and to serve him honestly and faithfully, in defence of his person, crown and dignity, against all his enemies or opposers whatsoever, and to observe and obey his majesty's orders, and the orders of the generals and officers set over me by his majesty.

So I do make oath, that I am by trade a , and to the best of my knowledge and belief was born in the parish of , in the county of ; and that I have no rupture, nor ever was troubled with fits, and am no ways disabled by lameness or otherwise; but have the perfect use of my limbs; that I am not an apprentice, and that I do not belong to the militia, or to any other regiment, or to his majesty's navy or marines. As witness my hand, at the day of one thousand eight hundred

Sworn before me, at this day of 180 .

Witness present.

[h] I A. B. one of his majesty's jus-

§ 8. MUTINY ACT —INLIST-MENT.

IF the perſon be inliſted to ſerve the Eaſt-India com he muſt take the oath of allegiance preſcribed by 39 III, c. 109, inſtead of the oath of fidelity; and, of c there muſt be a ſmall alteration in the certificate appl to that circumſtance [1]. And if any ſuch perſons ref

tices of the peace of (or chief magiſtrate of), certify that C. D. aged years, feet inches high, complexion, eyes, and hair, came before me at on the day of one thouſand eight hundred , and acknowledged that he had voluntarily inliſted to ſerve his majeſty king Geo. III, in the regiment of , commanded by , and that he now freely conſents unto the ſame. And I further certify, that in my preſence the ſecond and ſixth ſections (or ſuch articles thereof as the particular mutiny act may preſcribe) againſt mutiny and deſertion, were read over to him; and that he took the oath of fidelity mentioned in ſaid articles of war, and alſo the oath above ſet forth.

[1] Oath of allegiance, 39 Geo. III, c. 109.

I A. B. inliſted to ſerve either in his majeſty's troops, or in the forces of the Eaſt India company, according as his majeſty ſhall think fit, do ſwear that I will bear true allegiance to his majeſty king Geo. III. and that I will, as in my duty bound, defend him, his perſon, crown and dignity, againſt all his enemies; and that as long as I ſhall remain in his majeſty's ſervice, I will duly obſerve and obey his majeſty's orders, and the orders of the generals and officers ſet over me by his majeſty; and, that if his majeſty ſhall pleaſe to appoint me to ſerve in the forces of the united com merchants in England, tradin Eaſt-Indies, then I ſwear tha be true to the ſaid united co and will duly obſerve and o their orders and the orders generals and officers who ſhall fully ſet over me.

The certificate in ſuch ca follows:

I one of his majeſ tices of the peace cer aged years, inches high, complexi eyes, and hair, came be at on the day of one thouſand eight hundred and acknowledged that he ha tarily inliſted himſelf for the of to ſerve either in jeſty's army, or in the force Eaſt-India company, accordi majeſty ſhall think fit to ſuch adheres thereto. And I ſhall tify, that in my preſence the and ſixth ſections of the act war againſt mutiny and deſe ſuch articles of theſe ſections particular mutiny acts ſhall were read over to him; that the oath of allegiance preſcr 39 Geo. III, c. 109, to be taken of the oath of fidelity mentio ſaid articles of war, and alſo above ſet forth, and that he the ſum of on being

ake the ſaid oath of allegiance or fidelity reſpectively, the officer from whom he received the money may detain him ll he take it. Every military officer acting contrary hereto, r offending herein, ſhall incur the like penalty and forfeiture is by this act inflicted for making a falſe muſter, to be covered as any penalties by this act are recoverable. § 2. MUTINY ACT —INLIST-MENT.

BUT if any perſon ſhall receive the inliſting money from y officer, knowing it to be ſuch, and ſhall abſcond, or re- ſe to go before ſuch juſtice or chief magiſtrate, in order to ſtare his aſſent or diſſent, as aforeſaid, ſuch perſon ſhall be emed to be inliſted, and may be proceeded againſt as if he d taken the oath directed to be taken by the articles of war, fore the ſaid juſtice or chief magiſtrate. Receiving the inliſting money and abſconding.

IT was decided in the court of ſeſſion, that the twenty-four ours given, by the 73d ſection of the mutiny act, to per- s inliſted, for the purpoſe of declaring their aſſent or diſ- nt to inliſting, runs, not from the period of their inliſt- nt, but from the time of their being called before a ma- ſtrate in order to be atteſted; and alſo, that the ſhilling, other money, given by the ſerjeant as the ſymbol of in- ment, being part of the charges laid out in inliſting, is in- ded in the 20s. of ſmart money, paid when the party in- declares his diſſent to ſuch inliſting [k]. Deciſion of the court of ſeſſion.

[k] 30th July 1778, Low *ag.* Drum- d. The interlocutor was as fol- s

"Find it proved, that the three ſters were inliſted by Mac- , to ſerve in the charger's com- y of the Athol regiment, upon night of the 26th of January laſt, the ſymbol of a ſhilling given n in the king's name, but that no liſting money, or bounty, was paid, or agreed to be paid them: Find, that the only attempt to bring them before a magiſtrate, in order to be atteſted, was by a petition, preſented to the juſtices of the peace upon the 29th day of January, praying warrant to bring them before the juſtices for examination, which was ſerved upon the ſuſpenders that evening: And, find it proved, that, upon the day following, and within leſs than twenty-

§ 2. MUTINY ACT —MUSTER.

EVERY commiſſary or muſter-maſter, upon any mu be made, ſhall give convenient notice to the mayor, o chief magiſtrate, or officer of the place where the ſold quartered, who ſhall be preſent at every ſuch muſt give his utmoſt aſſiſtance for the diſcovery of any fal ter; and the commiſſary, &c. neglecting to give ſuch or refuſing the aſſiſtance of ſuch mayor, or other offic forfeit 5ol. and his office. No muſter-roll ſhall be a unleſs ſigned by ſuch mayor, &c.; but, if ſuch ma officer, ſhall not attend, or refuſe to ſign ſuch muſt without giving ſufficient reaſon for his refuſal, then th miſſary may proceed to muſter, without incurring a alty; and the muſter-roll ſhall be allowed, though n ed as aforeſaid, provided that oath be made before a within forty-eight hours after ſuch muſter; and t muſter-roll ſhall be then produced and examined by juſtice, who ſhall ſign the ſame, if there ſhall appear objection.

Muſter-maſter to give notice of intended muſters.

One juſtice.

Falſe muſters, penalty.

IF any perſon ſhall be falſely muſtered, or offer falſely to be muſtered; on proof thereof, by oath witneſſes, before the next juſtice, and on certificate under the hand of the commiſſary, or chief magiſt aforeſaid, he ſhall be committed to the houſe of co for ten days; and if any perſon ſhall wittingly ſ horſe to be muſtered, ſhall be forfeited to the inform belong to the perſon ſo lending, otherwiſe the offen

four hours after ſuch ſervice, they appeared, and judicially declared their diſſent to the liſting, and conſigned, each of them, in the hands of the clerk, 20s. for the charges laid out upon them; and find, that, upon ſuch declaration and conſignment, they were entitled to be diſcharged under the ſtatute: Find, that the ſhilling, given by the ſerjeant as of liſting, was properly charges laid out upon therefore, find, that they obliged to conſign ſuch and above the 20s.; ſons of ſuſpenſion, and Coll.

nalty 20l. to the informer, on oath by two witneſſes, before the next juſtice, by diſtreſs; and, if the offender ſhall have no ſufficient diſtreſs, or ſhall not pay the penalty within four days after conviction, he ſhall be ſent to the common gaol, without bail or mainprize, for three months, or be publicly whipped, at the diſcretion of the juſtice: the informer, if a ſoldier, ſhall be diſcharged if he demand it. § 2. MUTINY ACT —MUSTER.

THE commiſſary, or muſter-maſter, ſhall make oath (for which no fee ſhall be taken) before the mayor or chief magiſtrate attending the muſter, if ſuch mayor or chief magiſtrate be a juſtice of the peace, or, otherwiſe, before a juſtice[1]. This oath the commiſſary, &c. ſhall inſert and deſcribe, on the back of the muſter-roll tranſmitted by him into the office of the commiſſary-general of the muſters.

THE puniſhment of giving falſe certificates, to excuſe any ſoldier from muſter, or other ſervice; of officers making falſe muſters; and of commiſſaries or muſter-maſters wittingly allowing or ſigning muſter-rolls containing falſe muſters, fall under the juriſdiction of courts-martial.

EVERY mutiny act contains a clauſe, declaring, that officers and ſoldiers are to be quartered in Scotland, and carriages for the ſervice of the troops quartered or marching, provided and paid at the rates and in ſuch manner as by the Clauſe regarding Scotland.

[1] In the form following:

"I, A. B. do ſwear, that I ſaw, at the time of making the within muſter, the men or horſes as are borne, and inſpected, on the muſter-roll, for which men or horſes, a ſigned certificate, or certificates, are indorſed on the back of the roll, certifying their being abſent from the muſter, by reaſon of being employed on ſome other duty of the regiment, or by being ſick, in priſon, on furlough, or at graſs, or by a ſigned leave from the colonel or field officer, or officer commanding the regiment, troop, or company."

§ 2. MUTINY ACT

laws there in force at the time of the Union. Of theſe laws we ſhall ſpeak afterwards[m].

—CARRIAGES.

WITH regard to the exemptions from toll-duty meant to be allowed to the horſes of officers and ſoldiers upon march or duty, and for carriages attending them, it is enacted, by 18 Geo. III, c. 63, that no toll or duty ſhall be demanded or taken, by virtue of any act of parliament made or to be made, for repairing any public roads, in reſpect of any horſes belonging to officers or ſoldiers upon march, or upon duty, or for any horſes, cattle, or carriages, employed in carrying the arms or baggage of officers and ſoldiers, or in carrying any officers or ſoldiers who are ſick, wounded, or diſabled; and no carriages thus employed are ſubject to be weighed at any engine; nor is he owner or driver liable to any penalty or forfeiture for carrying any greater weight than is allowed by law to be conveyed in ſuch carriage.

18 Geo. III, c. 63, reſpecting horſes and carriages of officers and ſoldiers.

Paſſing ferries in Scotland.

AND where any troops, or parties upon command, have occaſion, in their march, to paſs regular ferries in Scotland, the commanding officer may either paſs over with his party as paſſengers, or hire the ferry boat entire to himſelf and his party, debarring others for that time, in his option; and, if he chooſe to take paſſage for himſelf and party, as paſſengers, he is to pay for himſelf and each perſon under his command

[m] Connected with the ſubject of billeting, is the examination of ſoldiers, having wives or children, with regard to their ſettlements. By this act, if any non-commiſſioned officer, or ſoldier, ſhall have either wife, child, or children, two juſtices may ſummon him where he is quartered, to make oath of the place of his laſt legal ſettlement, who ſhall obey ſuch ſummons, and make oath accordingly; and the juſtices ſhall give an atteſted copy of ſuch affidavit to be delivered to the commanding officer, to be produced when required; which atteſted copy ſhall be at any time admitted in evidence, as to ſuch ſettlement, before any juſtices, or at any ſeſſions; and if he be ſummoned again, he ſhall not be obliged to take another oath as to his ſettlement, but ſhall leave a copy of the former if required.

ay half the ordinary rate payable by ſingle perſons at any ich ferry; and if he hire the ferry boat for himſelf and arty, he is to pay only half of the ordinary rate. Where here are no regular ferries, officers with, or without parties, e to agree for boats at the ſame rates as others in like ſes. § 2. MUTINY ACT —CRIMES.

WITH reſpect to ſoldiers being guilty of crimes [n], it is acted, that if any officer or ſoldier ſhall be accuſed of any pital crime, or of any violence or offence againſt the per-, eſtate, or property, of any of the king's ſubjects, which puniſhable by the known laws of the land, the command- officer ſhall uſe his utmoſt endeavour to deliver over ſuch uſed perſon to the civil magiſtrate; and ſhall alſo be aid- and aſſiſting to the officers of juſtice in the ſeizing and rehending of ſuch offender, in order to bring him to trial. any ſuch commanding officer ſhall wilfully neglect or re- e, upon application made to him for that purpoſe, to de- er over any ſuch accuſed perſon to the civil magiſtrate, y ſuch officer ſo offending, and who is thereof convicted fore any two or more juſtices of peace for the county Two juſtices. ere the fact is committed, by the oaths of two credible neſſes, ſhall be, *ipſo facto*, caſhiered and diſabled; provid- the conviction be affirmed at the next quarter ſeſſions, d a certificate thereof be tranſmitted to the judge advocate, ho ſhall certify the ſame to the next court martial [o].

As to debts that may be incurred by ſoldiers, it is enact- l, that no perſon inliſted, or entered as a volunteer, either Debts due by ſoldiers.

[n] The trial of offences by a court martial, which the king may for this purpoſe appoint, by the articles of war, does not exempt the offenders from the ordinary proceſs of law.

[o] And it is alſo enacted, on this head, that no perſon or perſons, being acquitted or convicted of any capital crimes, violences, or offences, by the civil magiſtrate, ſhall be liable to be puniſhed by a court martial for the ſame, otherwiſe than by caſhiering.

MUTINY ACT—CIVIL DEBTS.

in the kingdom of Great Britain or Ireland, or any of his majeſty's foreign dominions, ſhall be liable to be taken out of the ſervice by any proceſs or execution, other than for ſome criminal matter, unleſs for a real debt, or other juſt cauſe of action, and unleſs affidavit be made before a judge of the court, out of which ſuch proceſs ſhall iſſue, that the original ſum juſtly due to the plaintiff from the defendant, amounts to 20l. at the leaſt, over and above all coſts of ſuit; a memorandum of which oath ſhall be indorſed on the proceſs or writ; for which memorandum or oath no fee is to be taken; and if any perſon ſo inliſted ſhall be otherwiſe arreſted, the judge may diſcharge him, and award coſts.

BUT that honeſt creditors may not be prevented from recovering their juſt debts, and, inſtead of an arreſt, which may at once hurt the ſervice, and occaſion great expence and delay to themſelves, may be enabled to proceed in a more cheap and eaſy method, it is provided, that the plaintiff may, on notice given in writing of the cauſe of action to ſuch volunteer, or left at his laſt place of reſidence before inliſting, file a common appearance, in an action to be brought for any debt, ſo as to entitle ſuch plaintiff to proceed therein to judgment and outlawry, and to have execution, other than againſt the body of him ſo voluntarily liſted [p].

UNDER this head, Dr. Burn, in one edition of his work, obſerved, that he thought a ſoldier could not be apprehended by a juſtice-warrant for begetting a baſtard child, and committed by ſuch juſtice to gaol for want of ſurety to indemnify the pariſh, or abide the order of maintenance by the juſtices.

[p] The court of king's bench unanimouſly decided, that a ſerjeant as well as a drummer or private ſoldier, was privileged from arreſts, Mr. Juſtice Denniſon remarking, that a ſerjeant is a ſoldier with a halbert, as a drummer is a ſoldier with a drum.

Since that time, however, the contrary has been determined by ſome deciſions of the Engliſh courts [q]. § 2. MUTINY ACT.

UPON notice from the clerk of the crown to the ſecretary at war, of any writ made out for the election of a member to ſerve in parliament, he ſhall ſend orders for removing ſol-

[q] In the caſe K. v. Archer, H. 28, Geo. III. The ſeſſion in Worceſterſhire having adjudged the defender, a ſoldier in actual ſervice, to be the reputed father of a baſtard child, ordered him to pay 2s. 6d. a week, ſo long as the child ſhould be chargeable. At the next ſeſſions, the ſoldier was committed to the bridewell for diſobeying the order, till he ſhould find ſufficient ſureties for the performance of it. A rule had been obtained to ſhew cauſe why the order of the ſeſſions by which the defendant was committed for diſobeying the order of baſtardy ſhould not be ſet aſide; becauſe the defendant being *a ſoldier in actual ſervice* was protected from being arreſted, for that came under the mutiny act. The judges were clear, that the caſe did not fall under the proviſions of the mutiny act; that the act had in view only the preventing arreſts in civil actions, and that it had no relation to crimes, nor any thing of a criminal nature; and, therefore, that the caſe of a ſoldier taken up for diſobeying an order of the juſtices, came not within the ſtatute; ſuch diſobedience being ſo far criminal, that in almoſt every inſtance, the party diſobeying, may be indicted for it. Alſo, in the caſe King v. Bowen, H. 33, Geo. III, the defendant W. Bowen was committed to the houſe of correction of Aylesbury, on a charge made by A. Ives of Eaton, for getting her with child, which child was likely to become a baſtard, for refuſing to give ſecurity to indemnify the pariſh of Eaton, and for refuſing to give a recognizance to appear at the next ſeſſions, and to abide ſuch order as ſhould be made in purſuance of 18 Eliz. c. 3. At the ſeſſions, he was ordered to be continued in cuſtody till he gave ſuch ſecurity. Bowen was a private ſoldier without any property except his pay and ſubſiſtence as a ſoldier. A. Ives was brought to bed. Lord Kenyon delivered the opinion of the court as follows: The caſe King v. Archer was decided on grounds perfectly ſatisfactory to me. There can be no doubt that incontinence is a crime, and it has always been conſidered as ſuch in the eccleſiaſtical courts. Now this clauſe of the mutiny act is clearly confined to civil actions. A penal action is ſo far conſidered as a civil action, that a quaker may be examined on his affirmation as a witneſs on the trial of it. It is a civil action, though ariſing from a penal ſtatute. But this proceeding cannot be conſidered in the nature of a civil action. It is altogether a criminal proceſs; and, therefore, I am clearly of opinion that the order of the juſtices is right. Order of the juſtices confirmed. Durnf. and Eaſt. 5, v. 156.

§ 2. MUTINY ACT

diers two miles or more from the place of election, at leaſt one day before the election, and to continue at leaſt one day after the poll taken. It is provided, at the ſame time, that this ſhall not extend to Weſtminſter, or other place of reſidence of the royal family, or to fortified places, or to any officer or ſoldier having a right to vote at ſuch election.

PAYMENT OF ACCOUNTS.

ON the head of payment for furniſhings, it is enacted, that every officer to whom it belongs to receive, or who does actually receive the pay or ſubſiſting money, ſhall immediately, upon receipt thereof, give public notice to all perſons keeping inns or other places, where ſoldiers are quartered, to repair to their quarters at the times appointed for the diſtribution of the pay, which is to be within four days at the fartheſt after receipt; and the ſaid innkeepers and others ſhall be firſt paid before any part of the pay be diſtributed to the officers or ſoldiers, provided ſuch accounts exceed not, for a commiſſion officer of horſe under the degree of a captain, for diet and ſmall beer, 2s. a day; nor for a commiſſion officer of dragoons, under the degree of a captain, 1s.; nor for a commiſſion officer of foot, under the degree of a captain, 1s.; and for hay and ſtraw to each horſe belonging to ſuch officers, 6d.; nor for one light horſeman's diet and ſmall beer, and hay and ſtraw for his horſe, 1s.; nor for one dragoon's diet and ſmall beer, and hay and ſtraw for his horſe, 1s.; nor for one foot ſoldier's diet, 4d. And if any officer ſhall not give ſuch notice, or ſhall not immediately, on ſuch accompt being produced, pay the ſame, then, upon complaint, and oath by two witneſſes, at the next quarter ſeſſions, the paymaſter, upon certificate of the juſtices at ſuch ſeſſions of the ſum due, and to whom, ſhall pay the ſame out of ſuch officer's arrears, on pain of forfeiting his office, and diſability; but, if no arrears be due, the paymaſter is to deduct the ſums to be paid, purſuant to the certificate of the juſtices, out of the next pay of the regiment;

h officer ſhall, for ſuch his offence, or for neglecting ſuch notice, be, *ipſo facto*, caſhiered. And, if it ſhall that the ſubſiſtence money due to any officer or ſol- ll, by any accident, not be paid, or that ſuch officer r ſhall neglect to pay the ſame; or, where horſe and upon their march, ſo that no preſent ſubſiſtence an be remitted to them, &c. in ſuch caſe, every of- fore his departure out of quarters, muſt make up the with every perſon with whom ſuch ſoldiers ſhall ntered, and ſign a certificate thereof, and give the the party to whom ſuch money is due, with the the regiment, troop, or company, to which he ſhall that the ſame may be tranſmitted to the paymaſter, ll immediately make payment thereof, under pain, ore directed, of non-payment of quarters. § 2. MUTINY ACT —PAY- MENT OF ACCOUNTS.

early mutiny acts contain a clauſe regarding officers to deſtroying game, which has been already men- another place. Deſtroying game.

rables, head-boroughs, or tithing-men, may take perſon reaſonably ſuſpected to be a deſerter, and m before a juſtice in or near the place; and if, upon tion, ſuch ſuſpected perſon ſhall be found, by his n, oath of one witneſs, or knowledge of ſuch juſtice, leſerter, the juſtice ſhall forthwith cauſe him to be to the county gaol, or houſe of correction, and mmit an account thereof to the ſecretary at war, may be proceeded againſt according to law; and the f ſuch gaol, or houſe of correction, ſhall receive the ſtence of ſuch deſerter for his maintenance, while he in cuſtody; but ſhall not be entitled to any fee mprisonment. One juſtice.

See above, p. 535.

MUTINY ACT —DESERTION.

To encourage any perſon to ſecure deſerters, the perſon apprehending and ſecuring, or cauſing to be apprehended and ſecured, any deſerter or deſerters, is declared entitled to the reward of 20s. to be paid him by the collector or collectors of the land-tax money of the pariſh where the deſerter is apprehended, and for which the juſtice is to iſſue his warrant to ſuch collector.

Reward for apprehending deſerters.

PERSONS harbouring, concealing, or aſſiſting, any deſerter, are to forfeit 5l.; and thoſe who ſhall, knowingly, buy or receive from any ſoldier, or deſerter, any arms, clothes, furniture, &c. belonging to the king, or change the colour thereof, ſhall alſo forfeit 5l.; and, on conviction, by the oath of one witneſs, before one juſtice, the ſaid penalties ſhall be levied by diſtreſs; one moiety of either penalty to be paid to the informer, and the other to the officer to whom ſuch ſoldier or deſerter did belong: And if any perſon, in tranſgreſſing as above, ſhall not have ſufficient for the diſtreſs, or ſhall not pay the penalty in four days after conviction, the juſtice may commit him to the common gaol for three months, or cauſe him to be publicly whipped.

One juſtice.

One witneſs.

No officer, however, may break open any houſe to ſearch for deſerters without warrant from a juſtice of peace; and whoever, without warrant from one or more juſtices, forcibly enters the dwelling houſe, or out houſes, of any perſon whatſoever, under pretence of ſearching for deſerters, is upon due proof thereof, to forfeit the ſum of 20l.

By the act 1 Geo. I, ſt. 2, c. 47, it is enacted, that any perſon or perſons whatſoever, who ſhall, directly or indirectly, perſuade or procure any ſoldier, or ſoldiers, in the ſervice of his majeſty, or of his heirs and ſucceſſors, to deſert, ſuch perſon or perſons, ſo offending, and being thereof lawfully convicted, ſhall forfeit the ſum of 40l. The mutiny act

the penalties enacted for offences againſt this ſtatute 9 G. 2. MUTINY ACT
, to be ſued for in any of the courts at Weſtminſter, ngland: For the like offences in Scotland, the penal- ſt be ſued for in the court of exchequer there; and, nd, they may be ſued for in any of the four courts at

If the offender ſhall not have goods worth 40l. or n the circumſtances of the crime, it ſhall be thought the offender may be awarded to priſon for a ſpace eeding ſix months, and may be ordained to ſtand on ory one hour.

ldiers, abſent from their regiments on furlough grant- —FUR- ſcm by their commanding officer, are ſometimes pre- LOUGHS. by ſickneſs, or other unavoidable caſuality, from re- A juſtice to their duty before the expiration of the time limit- may pro- ſuch furlough, it is therefore enacted, that any juſtice long the peace may grant, in writing under his hand, an exten- furlough. furlough to any non-commiſſioned officer or ſoldier, g for the ſame, on account of ſickneſs or other caſual- ch, to ſuch juſtice, ſhall, on due inquiry, appear to ſuch extenſion neceſſary; and that ſuch non-commiſ- officer or ſoldier during the period to which his fur- ſhall have been ſo extended as aforeſaid, by a juſtice peace, ſhall not be liable to be apprehended, or other- eſted, on the ground of his having deſerted or ab- himſelf from the regiment.

ſuch non-commiſſioned officer or ſoldier may be pro- againſt and puniſhed according to the proviſions of any act, ſhould it thereafter appear that ſuch non- ſioned officer or ſoldier had obtained the extenſion of ough by falſe repreſentation made to the juſtice of ce, or, in applying for and obtaining the ſame, had ted any offence to the prejudice of good order or diſcipline.

§ 3. QUARTERING OF SOLDIERS, AND CARRIAGES.

III. THE quartering of ſoldiers is, for the firſt time, mentioned in the act of convention 1667, which, notwithſtanding its ſtrong expreſſions of zeal, and even the dread of invaſion, gives no liberty to quarter the ſoldiers on any perſon againſt his will, allows no free lodging or free quarters of any kind, not even upon innkeepers or publicans, but makes the moſt anxious proviſion for ſecuring the ſubject againſt being put to any diſtreſs or inconvenience from the ſoldiery. This is provided for ſtill more explicitly by the the act 1681 [a], c. 3. But abuſes having been renewed in the arbitrary reign of James VII, this matter, ſo carefully attended to in England, was not overlooked by the ſtates of Scotland, when adjuſting the terms by which the crown was to be ſettled anew at the Revolution. Accordingly, by the claim of right in April 1689, it is declared, that one of the modes by which king James had violated the fundamental and conſtitutional laws of the land, was by levying or keeping on foot a ſtanding army in time of peace, without conſent of parliament; which army did exact locality, free

[a] This ſtatute, upon a recital of the laſt act of convention, and the many troubles and inconveniencies which ariſe from the tranſient or free quartering of ſoldiers, and from the localities for furniſhing and carrying of corn, ſtraw, or graſs, to ſoldiers horſes, doth diſcharge and prohibit all free quartering of the ſoldiers, either tranſient or local, and all localities for furniſhing and carrying corn, ſtraw, hay, or graſs, to ſoldiers horſes, and that from the 1ſt day of November next in the inſtant year 1681, the quartering and locality always betwixt and the ſaid 1ſt day of November being paid or allowed, conform to the ſaid act of convention; and in caſe any officers or ſoldiers ſhall exact any free quarter, or any ſuch locality thereafter, the damage being inſtructed before any two commiſſioners for the ſupply or excile, upon production of a certificate thereof under their hands; the officer being required, under form of inſtrument, to give redreſs to the party, and not doing the ſame, ſhall loſe a month's pay, to be paid to the party injured by the collector of the ceſs or excile in the ſhire, by and attour ſaid damage, which ſhall be allowed to him by the general receiver. And this puniſhment to be extended to any quartering for deficiency, which ſhall be uſed or exacted otherways than is preſcribed.

uarters. And it is declared, that the ſending of §3.
n a hoſtile manner, upon any part of the country, QUARTERING AND CARRIAGES.
f peace, and exacting locality, or any manner of
ers, is contrary to law.

t of convention 1689, c. 32, and act of parliament
, contain the ſame proviſion, and again declare,
officers and ſoldiers, horſe, dragoons, and foot,
due and punctual payment of their quarters, local
nt, as the ſame ſhall be appointed by the foreſaid
iers, according to the rates of the country;" and
ſoldiers do not pay for their quarters, the ſame
are laid down as in the former acts of conven-

t 1693, c. 4, entitled, againſt falſe muſters and
rs, approves and confirms an act of privy council,
e 14th of February 1693[b]; and farther provides,

act of privy council, all
g of ſoldiers in tranſient
ers, and all localities for
carrying corn, ſtraw,
, to ſoldiers horſes, are
reſaly prohibited by ſe-
f parliament formerly
e abuſes thus remedied,
en committed upon the
the illegal exaction of
e quarter; and, to pre-
in future, the act or-
e and timeous proviſion
ts, ſtraw, and graſs, for
s, in their reſpective
rters; and that timely
ren by all commanding
he commiſſary general,
al of the troops to and
arters, and of the route
appointed for their march, that proviſions may be ready accordingly.

If the march be ſudden, or ſuch as is not fit to be imparted to the commiſſary, then the oats, &c. neceſſary for the horſes, are to be bought by the commander of the ſeveral parties with ready money, to be repaid them by the commiſſary.

The commanding officer in any place of local or tranſient quarters, is to ſee the whole meat and drink, furniſhed to officers and ſoldiers under his command, by the landlords of their quarters, exactly and completely paid, at the ordinary rates o the country; and, in caſe there ſhall be any exaction, or diſcharge of free quarters extorted, or any abatement demanded below the ordinary rates,

§ 3. QUARTERING AND CARRIAGES.

that, in the caſe of either local or tranſient quarters, where due payment is not made by any officer or ſoldier, or where or any other abuſe committed, the commanding officer is required to make ready money payments, once every week at fartheſt, in local quarters, and in tranſient quarters before removal, if the troops ſtay ſhorter time than a week, and that under pain of being caſhiered and broken. *The party injured is to complain to the privy council, or to the ſheriff, or to the bailie of regality, or his depute, or the ſteward of the ſtewartry, or his depute, or to any two commiſſioners of ſupply of the bounds and ſhire where the offence is committed, who, or either of whom, are required to receive the ſaid complaints, and tranſmit them to the clerks of the privy council,* within ten days after they are made, under pain of being liable to repair the party injured themſelves; and theſe complaints are to be purſued by the king's advocate and ſolicitor, at the public charge; or, if any private party chooſe to purſue them, his expences are to be reimburſed; the whole expences, in both caſes, being ultimately deducted from the officer's pay againſt whom the complaint is made and verified.

If an inferior officer tranſgreſſes in this reſpect, he is to be caſhiered and broken; if a non-commiſſioned officer, by the perſon commanding in chief, or to be ſuſpended by him, if a commiſſioned one; the commanding officer immediately repreſenting the ſame to the privy council, who may give orders for caſhiering ſuch commiſſioned officer. The complaint muſt be made to the commanding officer within eight days after a week's quarters are reſting, or other abuſes committed, and, in tranſient quarters, before removal, otherwiſe the commanding officer ſhall be free; without prejudice, however, to the landlords, and others, of the legal means of recovery. *It is ſufficient evidence that complaint has been made to the commanding officer, if the ſame be made to him in the preſence of a magiſtrate within borough, a juſtice of peace, or two witneſſes.* No diſcharges ſhall be ſufficient for exonering the officers and ſoldiers, and inſtructing the payment of their quarters, unleſs ſubſcribed by the maſter of the ground, or his chamberlain, or the officer of the ground, before two witneſſes, or a magiſtrate within borough.

Officers and ſoldiers are ſtrictly prohibited from keeping or ſeizing horſes for their own private uſe; and the penalty of tranſgreſſion is made to be a month's pay, upon complaint brought and inſtructed as aforeſaid. Where horſes are neceſſary for carriage, they may be employed, if furniſhed within borough, by order of the commander of the party, and the magiſtrates, jointly; and, if in landward, by order of the ſaid commander, and any one of the commiſſioners of ſupply within the ſhire. The rate to be paid for each day that the ſaid horſes ſhall travel, are, three ſhillings Scots for each two miles to the man and horſe; and for each day that they do not travel, ſix ſhillings Scots to the man, and as much for the horſe, the man being obliged to provide himſelf and the horſe. Theſe expences are to be paid by the magiſtrates of the borough, if the horſes

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any abuſe ſhall be committed by them, the debt contracted in quarters, or damages done, may be inſtructed before a juſtice of peace, or a commiſſioner of exciſe and aſſeſſment, magiſtrate of borough, or the next neighbouring heritor, by witneſſes, or oath of the party leſed; and the juſtice, &c. efore whom the ſaid quartering or damage is inſtructed and quidated, is obliged to give the landlord, upon whom the fficers or ſoldiers were quartered, a declaration, bearing the alue of the quartering and damages ſuſtained. The collector of the ſhire is to give allowance to the landlord for he ſame, out of the fore-end of his ceſs or exciſe; and the ollector is to have allowance thereof from the receiver-general: If the landlord be a tenant, or other perſon, liable neiher to ceſs nor exciſe, the heritor of the ground is to have uch allowance as aforeſaid, in order that the tenant may get ayment thereof. The collectors are to give account of this o the general commiſſary, or paymaſter of the army, that he ſame may be retained off the officer's or ſoldier's pay. f the officer firſt applied to do not give redreſs, the officer's ay is, in that caſe, to be equally liable with the ſoldier's ay. And the collector and receiver-general are to give alowance, as aforeſaid, under pain of deprivation, by and nour the refunding of the damage of the party leſed.

A juſtice.

His duty.

THE laſt enactment of the ſtatute, is appointing it to be

e taken within a town, and, if in e country, by the collector of the pply in the ſhire, who are reſpecively to be reimburſed thereof, or ve the ſame allowed to them, by e receiver-general. *That the horſes eſſary may be provided, magiſtrates ithin boroughs, and commiſſioners of pply, and juſtices of peace, in landwar, e ordained to cauſe a competent number provided within their reſpective bounds* e officer or ſoldier, without the concurrence of theſe magiſtrates, is to ſeize, upon any horſe, nor are horſes to be detained longer than one day's march at fartheſt, but are to be reſtored in good caſe, under the pain of a month's pay, beſides payment of the price of the horſe to the furniſher, as the ſame ſhall be inſtructed before the bailies *within borough, and, in the country, before ſheriffs, ſtewarts, bailies of regality, or their deputies, and juſtices of peace.*

§ 3. QUARTERING AND CARRIAGES.

read publicly at the head of every regiment, troop, pany, every time the ſame is muſtered, that due o may be given thereto.

By the acts 1695, c. 33, and 1696, c. 23, no off preſs or compel any man to be a ſoldier; and no c ſoldier is to exact lodging, coal, or candle, gratis, ſelf, his wife, or children. The penalty of preſſing to be forfeiture of a month's pay, and impriſonmen or breaking and caſhiering. Officers exacting lodg as aforeſaid, are to loſe their commiſſion: And ſold tranſgreſſing are to be liable for the parties damag paid by their commanding officers, at the ſight and ment of any magiſtrate within borough, or other j landward; and the officer failing herein is liable months pay; and is farther declared puniſhable as of council ſhall appoint.

It appears, that all this anxiety of the legiſlature ineffectual to ſecure againſt the irregularities of the Three abuſes ſeem about this time to have been p One was, that the officers of the army had taken c ſelves to direct the quarters. Another, that ſoldie cularly dragoons, had been quartered upon tenant perſed onſteads in the country, on pretence of ſtub ters. A third was, that the ſoldiers had inſiſted fo fires, &c. in their quarters. To obviate theſe ab act 1698, c. 9, was paſſed. It ordains, that, i peace within the kingdom, ſoldiers in their local ſhall be quartered only in boroughs royal, or of re the moſt capable market towns, and not upon te diſperſed onſteads in the country, upon pretence ſtubble quarters, or of any other cauſe whatſomeve ing allenarly quarters for deficiency, as the ſame lated by former acts of parliament; and that, w local or tranſient quarters, the landlord ſhall not b

Soldiers not to be quartered upon tenants in the country.

2

to furniſh common ſoldiers with coal or candle, otherwiſe than according to the ordinary faſhion of the houſe; and further, moſt ſtrictly forbids all free quarter, and all abuſe or oppreſſion of the lieges, by ſoldiers in their quarters, or out of them, ratifying all former acts againſt free quarters, and particularly the act 1693, c. 4. § 3. QUARTERING AND CARRIAGES.

For abuſes and miſdemeanours committed by ſoldiers, in ſtal or tranſient quarters, againſt any perſons not ſoldiers, they may be either complained of to their officers, or convened, upon ſummary complaint before the juſtices of peace, or other judge ordinary, where their officer ſhall be obliged to ſiſt them, under the pain of 100 merks, and reparation of damages, *toties quoties*.

Officers, likewiſe, by this act, are required to be careful in cauſing the ſoldiers under their command go to church, and attend divine worſhip duly upon the Lord's day; to ſubmit to the miniſter's examination, and to church diſcipline; and the officers themſelves are to ſhew good example, as they will be anſwerable.

This ſtatute, in order to render more effectual the allowance to be made by the ſtatute 1693, c. 4, by collectors of ſhires, and the receiver-general, declares the collector refuſing ſuch allowance liable to the party leſed in the ſum of 20l. Scots. *toties quoties*, at the ſight of any two of the commiſſioners of aſſeſſment, and the receiver-general to be liable, beſides the former pains, in the ſum of 500 merks, *toties quoties*, at the ſight of the lords of his majeſty's treaſury and exchequer. It likewiſe enacts, that the ſame execution ſhall be granted for payment of carriages. The next act 1698, c. 5, is employed wholly upon quartering for deficiency in uplifting the land tax.

§ 3. QUARTERING AND CARRIAGES.

In the borough of Canongate, the uſage had been to quarter ſoldiers on traders and ſhopkeepers only. In the year 1786, the magiſtrates ordered that ſoldiers ſhould be quartered on the whole inhabitants, without diſtinction. Some of the private inhabitants brought the matter before the court of ſeſſion, which ordered an inquiry to be made as to the practice of almoſt every conſiderable town in Scotland. It appeared that the burden, though it had not, as in England, been confined to innkeepers alone, had yet been laid on them, together with butchers, bakers, grocers, and ſuch other traders as were thought to be moſt benefited by the ſoldiery, but never on the inhabitants indiſcriminately, unleſs in caſes of emergency. The court decided, that the purſuers were exempted from the charge in queſtion.

This deciſion was contrary to one which had been pronounced a few years before [c]; and it has not been followed in ſubſequent caſes. The private inhabitants of Beith, a village in Ayrſhire, complained, by bill of ſuſpenſion, of an order of the juſtices of peace, by which ſoldiers were billeted on the whole inhabitants indiſcriminately, excepting ſchoolmaſters, widows, unmarried women, and paupers; inſiſting that this burden ſhould be confined to innkeepers, and dealers in proviſions. The court was of opinion, that Beith not being even a borough of barony, and all the inhabitants being nearly of the ſame rank, there was no ground for any claſs of them pleading an immunity, and refuſed the bill [d]. Thereafter the court generally decided, that even in a royal borough, the ſoldiers ſhould be quartered upon the whole inhabitants,

All individuals liable,

Excepting unmarried women, &c.

[c] Calton of Glaſgow, 1779. Not collected.

[d] June 3, 1794, Crawford againſt Wilſon. Dict. V. iv, p. 194.

A ſimilar deciſion was pronounced in a diſpute between ſome inhabitants of the burgh of barony of Saltoun, the home manufacturers and traders pretending that the burden ſhould lie on thoſe who exerciſed a foreign trade. May 27, 1794. Dict. ibid.

without diſtinction, except ſchoolmaſters, unmarried women, and paupers[e]. Which deciſion, on the laſt occaſion that this point came under the cognizance of the court of ſeſſion[f], was held to be fixed law. § 3. QUARTERING AND CARRIAGES.

IV. SOLDIERS being expoſed to extraordinary hardſhips, are indulged with peculiar privileges. § 4. PRIVILEGES —TESTAMENT.

BY the Roman law, it was held to be a good teſtament with the ſoldier wrote in bloody characters upon his ſhield, or in the duſt with his ſword[g]. This, Ulpian tells us, was firſt merely a temporary indulgence of Julius Cæſar. It was renewed, from time to time, by his ſucceſſors; and, in the reign of Juſtinian, became part of the eſtabliſhed law. Roman law.

THIS was the privilege, however, only of ſoldiers when engaged in actual ſervice[h].

The law of England has been equally favourable. By the 29 Car. II, c. 3, 5; William, c. 21, § 6, ſoldiers in actual ſervice may make nuncupative wills, and diſpoſe of their perſonal effects, without thoſe ſolemnities, forms, and exactnes, which law requires in other caſes.

LORD BANKTON obſerves, that "it may be thought ſuch privileges may be ſuſtained with us, being always limited to perſonables, and to ſuch part of them as by our law are the Scottiſh law.

[e] May 31, 1796, Aitchiſon againſt [illegible] of Haddington. Dict. [illegible].

[f] Inhabitants of St. James's ſquare without the town of Edinburgh. The town claimed an exemption from billetting within the royalty. It was held, that ſuch a local exemption could be obtained by preſcription; but claſſes of individuals were thought to ſtand in a different predicament, that the erroneous exemption of any in times paſt could create no title to exemption in future:

[g] L. 15, c. de teſt. milit.

[h] *In expeditionibus occupati.* Vinnii comment. ad tit. lib. ii, Inſt. de milit. teſt.

§ 4. PRIVILEGE. ſubject of teſtaments; but we having no ſuch ſtatute as the Engliſh have, it muſt be on the principles of the civil law, whereof I know no precedent[1]."

—EXERCISING ANY TRADE. DISBANDED or diſcharged ſoldiers may exerciſe any trade within any freedom. There have been ſeveral ſtatutes enacted with a view to this important privilege. Thus, by the ſtatute 22 Geo. II, c. 44, it was enacted, that all officers, mariners, and ſoldiers, who have been employed in his majeſty's ſervice, and not deſerted, may ſet up and exerciſe ſuch trade as they are apt for in any town or place within Great Britain or Ireland (except Oxford and Cambridge); and if they ſhall be ſued thereupon, they ſhall have double coſts. And, by the 3 Geo. III, c. 8, it is enacted, that any bye-laws or cuſtoms to the contrary notwithſtanding, or any ſtatutes requiring apprenticeſhips for a certain term of years, all officers, mariners, ſoldiers, and marines, who have ſerved ſince the 29th day of November 1784, (and by 24 Geo. III, § 2, c. 6, the ſame is further extended to thoſe who have ſerved ſince the 1ſt day of April 1763), and not deſerted, and alſo their wives and children, may ſet up and exerciſe ſuch trades as they are apt and able for in any town or place in Great Britain or Ireland (except Cambridge or Oxford); nor while they exerciſe ſuch trade are they to be removeable from the place where they exerciſe it, to their laſt legal place of ſettlement, until they ſhall become actually chargeable; and, if they ſhall be ſued for exerciſing ſuch trade, they ſhall have double coſts. Any two juſtices may cauſe ſuch ſoldiers, mariners, &c. to be ſummoned, to make oath of their laſt place of legal ſettlement; and the party ſummoned, upon making oath, is to get an atteſted copy of the affidavit, in the manner and for the purpoſe mentioned above, when treating of the examination of ſoldiers with regard to their ſettlements.

Two juſtices.

[1] Bank. Inſt. Vol. i, b. 1, tit. 2, part 88.

§ 4. PRIVILEGES—EXERCISING ANY TRADE.

BUT diſbanded ſoldiers are not entitled to exerciſe a plurality of trades. They have no greater privilege in this reſpect than a member of that corporation whoſe trade they exerciſe [k].

IT was lately decided in the court of ſeſſion, that the daughter of a ſoldier, although married to a perſon not a member of the guildry, may retail groceries within burgh [l].

BUT a "diſtinction is to be made between occupations for the moſt part exerciſed by men, and thoſe frequently exerciſed by women. In the former caſe, it would, in general, be preſumed, that the ſoldier's daughter married to an unfreeman, is attempting collufively to communicate to her huſband a privilege perſonal to herſelf. But, in the latter, there is no room for that preſumption [m]."

ACCORDINGLY [n], it has been decided, that a ſoldier's daughter, married to an unfreeman, did not entitle her huſ-

[k] William Muir, &c. againſt W. M'Bean, &c. 1792, Feb. 19.

[l] Dec. 16, 1792, treaſurer of the guildry of Perth againſt James Macdonald.

The guildry complained to the dean of guild and his council, ſtating, that that trade (a retailing of bread, meal, and ſmall groceries) had been ſet up by the wife after marriage, and conducted, though in her name, yet for the huſband's behoof, and concluding, that he ſhould either enter with them, or pay the yearly compoſition of unfreemen. The dean of guild decided, that "the defender's being married to a diſcharged ſoldier's daughter, does not entitle him to the privilege of trading within borough; and therefore fined and amerciated him in 30s. to be paid to the guild treaſurer, for behoof of the treaſurer." Macdonald having brought this judgment under review, by advocation, "the lord ordinary aſſoilzied the defender from the action, and found the purſuers liable to the defender in the expence of extract." On adviſing a petition and anſwers, the court unanimouſly adhered, and found the purſuers liable in the expence of the anſwers.

[m] Ibid. Obſervation from the bench.

[n] 29th Jan. 1778, tailors in Glaſgow againſt M'Kechnie, &c. 24th Feb. 1790, corporation of ſhoemakers of Perth againſt Elizabeth M'Morten.

§ 4. PRIVILEGES —EXERCISING ANY TRADE.

band to carry on either of the trades of tailor or shoemaker within borough.

In like manner it was determined, that a trade exercised in name, and (as it was said) for behoof of a discharged soldier's son, who was only twelve years of age, was an evasion of the exclusive privileges of the corporation[o].

—MAINTENANCE.

Concerning the maintenance of discharged soldiers in sickness, the act 23 Elizabeth c. 3, enjoins a weekly allowance to be raised in every county, for the relief of such soldiers and mariners as are sick, hurt, or maimed, to be charged upon the parish, as the justices in sessions shall appoint; provided no parish be rated above ten-pence, nor under two-pence, weekly; and provided the total sum in any county, where there shall be above fifty parishes, do not exceed six-pence for every parish. As this, however, is left to the discretion of the justices, Burn observes, that it is not usually done, and they are commonly provided for by the particular parishes to which they belong, or supported in the royal hospitals of Greenwich and Chelsea respectively.

With regard to the out-pensioners of Chelsea hospital, it is required by the statute 28 Geo. II, c. 1, § 2, that the justices of the peace shall take affidavits of their being alive (or of the time of their deaths respectively), half yearly, without fee.

[o] The decision of the lord ordinary was, "that the said James Lee had no title to assume the profession of a baker in the borough of Haddington, being a boy between twelve and thirteen years of age." A reclaiming petition against this interlocutor was refused, without answers.

CHAP. IV.

Of the Militia.

§ 1. IN GENERAL.

THE firſt militia force in Scotland was raiſed in virtue of the ſtatute 37 Geo. III, c. 103. The powers h by this act were enlarged by 38 Geo. III, c. 12. Both ites were amended by 39 Geo. III, c. 72, and 41 Geo. c. 67; but the whole previous acts were ſuperſeded by 42 Geo. III, c. 91. Particular alterations, however, been made by ſubſequent enactments[a].

ONSIDERING the length of the ſaid ſtatute, and the con- ti alterations that take place in this department of the it is not poſſible, in a work of this kind, to give any an- s that could be of any practical importance. Some of more general proviſions ſhall therefore be briefly taken ce of, and particularly what duties, under theſe acts, are mbent on juſtices of peace and commiſſioners of ſupply.

1. THE king, from time to time, appoints lieutenants 42 c. III, c 91.

[a] 43 Geo. III, c. 38, 50, 59, 71, 72, 100.

§ 1. IN GENERAL.

for the counties, ſtewartries, and cities, who appoint not only their reſpective deputies, but alſo the militia officers, provided the perſons have the king's approbation, and alſo the legal qualification [b].

Acting without qualification.

PERSONS acting without the requiſite qualification, are liable in penalties [c]. Within ſix months they muſt take the oaths of allegiance, abjuration, and aſſurance [d]. The king

King may diſplace.

may diſplace deputy lieutenants or officers.

Clerks.

THE lieutenant, from time to time, names the clerk of the general meetings, and may diſplace him as he ſhall ſee fit [e]. The major part of any meeting of deputy lieutenants

[b] Peers, however, and their heirs-apparent, need no qualification. Deputy lieutenants muſt have 400l. Scots of valued rent a-year; colonels, 800l.; lieutenant colonels, 600l.; majors and captains, 400l.; lieutenants, 100l.; enſigns, 50l. within their reſpective counties, or places joined together to form the regiment to which they belong.

In the city of Edinburgh, the deputy lieutenant muſt have 100l. ſterling a-year of real eſtate, in houſes or property, within the liberties; the lieutenant colonel, 200l. ſterling; the major or captain, 100l. ſterling; the lieutenant, 50l. ſterling; enſigns, 25l. ſterling.

Note.—What is the meaning of the ſaving clauſe to the ſurgeon. § 7.

In Bute and Sutherland, the qualification is either a real eſtate of 100l. a-year, or a real and perſonal eſtate together, in value 2000l. ſterling; and if perſons ſo qualified cannot be found, then magiſtrates of boroughs royal, or of regality or barony, or juſtices of peace, may be appointed deputy lieutenants, their names being firſt approved of by his majeſty. 41 Geo. III, c. 89, § 22.

Theſe qualifications muſt be delivered to the clerk of ſupply, and tranſmitted to the county lieutenant. The commiſſion muſt bear this to have been done. Clerks of ſupply muſt inrol qualifications, and inſert the dates of commiſſions in the London gazette; and annually tranſmit to the ſecretary of ſtate accounts of qualifications, to be laid before parliament. § 9.

[c] Deputy lieutenants, colonels, lieutenant colonels, majors, are liable in 200l. ſterling, captains in 100l. ſterling; one half whereof goes to the informer, and the proof lies on the perſon againſt whom the action is brought.

[d] 1 Geo. I, ſt. 2, c. 13; and 6 Geo. III, c. 53.

[e] 42 Geo. III, c. 90, § 28.

§ 1. IN GENERAL.

ke manner, appoint the clerk of the district meet-
nay remove him [f].

Number of men.

tal number of private men to be raiſed is 8000,
of ſerjeants, corporals, and drummers [g].

umbers fixed in the ſtatute were to continue the
June 1805. Afterwards the numbers are to be
by the privy council, which afterwards, every ten
l fix the quotas for each county [h].

General meeting.

AL meetings of the lieutenancy of every county or
ſting of the lieutenant and two deputy lieutenants

Quorum.

(in the abſence of the lieutenant) of three deputy
, muſt be held yearly on the laſt Tueſday before

When.

y of Auguſt in every year; and on any other day
eutenant and two deputy lieutenants, or (in caſe of
e of the lieutenant) any three deputy lieutenants,

Notice.

imation of the time and place in the newſpapers [i].

III, c. 91, § 14, 15.
Edinburgh, 333; city
unty of Linlithgow, 94;
on, 154; of Berwick,
les, 45; of Selkirk, 25;
178; ſtewartry of Kirk-
51; county of Wigton,
436; of Renfrew, 404;
51; of Stirling, 253; of
of Fife, 484; of Dum-
of Bute, 61; of Argyle,
erneſs, 384; of Perth,
ar, 511; of Kincardine,
rdeen, 640; of Banff,
, 138; of Nairne, 43;
16; of Roſs, 270; of
00; of Caithneſs, 121;
184; of Clackmannan, 56.

h St. 42 Geo. III, c. 91, § 33.
Where the numbers fixed ſhall be greater than the former quota, the general meeting ſhall appoint what number ſhall be choſen for each diviſion, and where leſs, ſhall diſmiſs the exceſs by ballot proportionably out of each diviſion. § 33. But the men ſo diſmiſſed are liable to ſerve; and a liſt of their names muſt therefore be made up, out of which vacancies are to be filled up during the remainder of the engagement. § 33.

i § 16. The expence of theſe notices is to be charged to the collector of the land tax. If there be no quorum preſent, any deputy lieutenant preſent, and if none be preſent, the clerk may adjourn the meeting.

§ 1. IN GENERAL.

SUBDIVISION meetings muſt conſiſt of two deputies, or one deputy and a juſtice of the peace [b].

General meetings.

GENERAL meetings ſhall appoint ſubdiviſion meetings [c]; and the returns are to be made by the ſchoolmaſters or chief conſtables [d], they verifying their liſts on oath [e]: The endeavouring to prevail on a ſchoolmaſter to make falſe returns [f], the partiality or neglect of conſtables therein [g], the joining the liſts for two pariſhes together [h], the neglecting of the clerk of diviſion to tranſmit to the clerk of the general meeting copies of rolls or making falſe returns [i], the allotment of men in each diviſion to ſerve in the militia [k], the number of men to ſerve in each pariſh [l], the notices to be given of the balloting [m], the oath of allegiance to be taken [n]; and by ſubſtitutes [o];—theſe things are provided for in their reſpective clauſes.

Liſts, return of.

Liſts verified.

Amended.

Certificates returned.

THE inhabitants of any place may produce volunteers, who, if approved, ſhall be ſworn and enrolled [q],

§ 2. EXEMPTIONS.

II. PEERS, commiſſioned officers, officers on the half pay of the navy, army, or marines, or who have ſerved four years in the militia, profeſſors in any of the four univerſities, licenſed clergymen, pariſh ſchoolmaſters, teachers licenſed to teach within any ſeparate congregation, whoſe place of meeting ſhall have been duly regiſtered within twelve months previous to the general meeting in Auguſt, conſtables and peace officers, apprentices, ſeamen, ſeafaring men [q], perſons employed or muſtered in the king's ſervice in any fort, perſons having more than two lawful children, and not worth 5ol. ſter-

[b] 42 Geo. III, c. 91, § 17. The clerk gives notice thereof. If no deputy lieutenant attends, the clerk may adjourn the meeting. See alſo 43 Geo. III, c. 50 and c. 100.
[c] § 20.
[d] 42 Geo. III, c. 50, § 7.
[e] Ibid. § 25.
[f] § 26.
[g] § 27.
[h] § 29.
[i] § 31.
[k] § 34.
[l] § 35.
[m] Ibid.
[n] Ibid.
[o] § 36.
[p] § 37.
[q] 43 Geo. III, c. 91.

ing, perſons having ſerved perſonally or by ſubſtitute in virtue of this or any former militia act, are exempted [r]. § 7. EXEMPTIONS.

If a quaker be choſen, but neglect to appear and make oath, any two deputy lieutenants may provide ſubſtitutes for him, and levy the expence by diſtreſs [s].

The regulations as to amending liſts, ballotting men, filling up vacancies, providing ſubſtitutes for quakers, &c. balloting men and having them examined by a ſurgeon, diſcharging perſons unfit for ſervice, providing men in lieu of thoſe whoſe time expires, are contained in 42 Geo. III, c. 91, 63 and 56, and 43 Geo. III, c. 50 and c. 100. Balloting. Vacancies. Quakers. Unfit for ſervice.

It is ſpecially provided, that the inrollment of ſervants ſhall not vacate their contracts with their maſters, unleſs the militia ſhall be embodied or called out, or unleſs ſuch perſon ſo inrolled ſhall leave the ſervice of his maſter for the purpoſe of being trained and exerciſed for the ſpace of twenty-one days in purſuance of this act, and ſhall not return again at the end of the twenty-one days, or as ſoon after as reaſonably may be, allowing to his maſter an abatement of his wages in proportion to the duration of his abſence [t]. Servants.

And if any diſpute ſhall ariſe between the ſervant and his maſter touching wages under 20l. ſterling, any two juſtices may examine on oath every ſuch ſervant, or any other witneſs or witneſſes touching the ſame, and to make ſuch order for payment of ſo much wages to ſuch ſervant in proportion to the ſervice he has performed, or ſuch abatement from his wages in proportion to the duration of his abſence from his ſervice, as the caſe may require, provided the ſum in queſtion does not exceed the ſum of 20l. ſterling: and, in caſe Two juſtices. Oath. Abatement of wages.

[r] 42 Geo. III, c. 91, § 38, 123, 124. [s] 42 Geo. III, c. 91, § 45.
[d] 43 Geo. III, c. 124. [t] Ibid. § 56.

§ 2. EXEMPTIONS.

of non-payment of ſuch ſums, ſuch juſtice [u] may iſſue for his warrant to levy the ſame by diſtreſs and ſale of the goods and effects of ſuch maſter or miſtreſs, rendering the overplus to the owner after paying the charges [x].

Payment of money to ſubſtitutes.

IF one engage another to ſerve as his ſubſtitute, or to ſerve as a volunteer, and ſhall have agreed to pay a certain ſum for ſuch ſervice, it ſhall be lawful to any two deputy lieutenants, or to any one juſtice of the peace, to order the money to be paid to ſuch ſubſtitute or volunteer, when the militia is not embodied; and where it is, in that caſe only, one half ſo to be paid; and the other to the paymaſter to be paid the man on his joining and being approved; and if he ſhall not join, it ſhall remain in the hands of the paymaſter, to be applied in like manner to the payment of ſome other ſubſtitute or volunteer. The payment of ſuch money is to be enforced in the ſame manner as is directed for the recovery of wages in Scotland. The clerk neglecting to remit ſuch money for one week after it has been paid to him, ſhall incur a penalty of 20l. ſterling [y].

or volunteers.

Any one juſtice.

If he ſhall not join.

Payment how enforced.

THE training and officering of militia regiments [z], augmenting the field officers [b], additional majors to increaſe regiments [c]; the appointment of adjutants, ſurgeons, quarter maſters, regimental clerk, ſergeant majors, extra corporals and non-commiſſioned officers, drummers and extra drummers [d]; the training and exerciſing the men, and enlargement of the time of exerciſe [e], the penalty of buying or ſelling the arms of militia men [f]; the mode of proceeding againſt

[u] The act muſt mean two juſtices, it being any two who have juriſdiction in this buſineſs.

[x] 42 Geo. III, c. 91, § 56.

[y] § 57.

[z] Ibid. § 63 to 70, 146, 148, 43 Geo. III, c. 39.

[b] 43 Geo. III, c. 71.

[c] 42 Geo. III, c. 91, § 146 to 148.

[d] Ibid. § 71 to 80.

[e] Ibid. § 82 to 95, and 43 Geo. III, c. 19.

[f] 42 Geo. III, c. 91, § 97, 98.

ttending annual exerciſe, or deſerting, and on ſub- § 2.
volunteers, or ſerjeants, or other non-commiſſioned REGULATIONS.
o have deſerted or are ſuſpected of an intention of
, theſe things are all particularly regulated.

may be neceſſary to take notice, that any one juſ- One juſtice.
ed with juriſdiction in the caſe either of perſons Perſons not appearing.
appearing to be ſworn [b], or of militia men not

III, c. 91, § 104, 105, 106.

7. Every perſon who money from any other s as his ſubſtitute in the n any perſon or perſons, volunteer as aforeſaid, leſt to appear at the appointed for ſwearing men, or before ſome utenant, in order to be ng to the directions of convicted thereof be- y lieutenant or juſtice ſhall be obliged to re- y to the perſon or per- m he received it, and d pay to ſuch perſon ſum not exceeding 40s. os. at the diſcretion of utenant or juſtice of the hom he ſhall be ſo con- ſuch offender ſhall not turn the money ſo by as aforeſaid, and like- aid penalty, he ſhall be the common gaol or ſion for fourteen days, d ſum ſhall be return-

militia man ſhall not ent or battalion, de- viſion, to which he be- longs at the time of annual exerciſe, or ſhall deſert during the time of annual exerciſe, and ſhall not be apprehended before the expiration of the time appointed for ſuch exerciſe, and if the commanding officer, or the adjutant of ſuch regiment or battalion, or the commanding officer of the company, detachment or diviſion, to which ſuch offender belongs, ſhall receive information of the place where he ſhall be or reſide, any ſuch commanding officer or adjutant may, by writing under his hand, deſcribe the perſon of ſuch offender, and alſo certify that he did not join the regiment or battalion, detachment or diviſion, at the time of annual exerciſe, or that he deſerted during the time of annual exerciſe (as the caſe may be), and ſend the ſame by a ſerjeant, corporal, or drummer, of ſuch regiment or battalion, to the adjutant or ſergeant-major of the regiment or battalion, or to the ſenior ſerjeant when there is no adjutant or ſerjeant-major of the regiment or battalion, or detachment or diviſion thereof of the county, ſtewartry, city, or place, wherein ſuch offender is ſuppoſed to be or reſide, and the adjutant, ſerjeant-major, or ſenior ſerjeant, to whom ſuch certificate ſhall be ſent,

§ 2. REGULATIONS. Not joining, &c.

joining the regiment in the time of annual exerciſe, or deſerting during ſaid period, and not apprehended before the expiration thereof, or of any ſerjeant, corporal, or drummer,

ſhall forthwith direct a party of the ſerjeants, corporals, or drummers of the regiment or battalion to which he belongs, to aſſiſt in the apprehending ſuch offender, and in conveying him before ſome juſtice of the peace of the county, ſtewartry, city or diviſion wherein ſuch offender ſhall be apprehended; and if by his confeſſion or the teſtimony of any witneſs or witneſſes upon oath, or the knowledge of ſuch juſtice, it ſhall appear or be found that ſuch perſon is guilty of ſuch offence, ſuch adjutant, ſerjeant-major, or ſenior ſerjeant, as aforeſaid, ſhall order a party of the ſerjeants, corporals and drummers, under his command, to convey ſuch offender to the head quarters of the regiment or battalion of militia of the next county, ſtewartry, city or place, in the way to the county, ſtewartry, city or place to which ſuch offender belongs, and deliver him into the cuſtody of the adjutant or ſerjeant-major of ſuch regiment or battalion, or ſenior ſerjeant, as aforeſaid, who ſhall cauſe him to be conveyed in like manner to the adjutant or ſerjeant-major of the regiment or battalion, or ſenior ſerjeant of the regiment or battalion of the next county, ſtewartry, city or place, and ſo in like manner until ſuch offender ſhall be delivered into the cuſtody of the adjutant or ſerjeant-major of the regiment or battalion, or ſenior ſerjeant, as aforeſaid, of the corps to which he belongs, who ſhall take him before a juſtice of the peace, to be dealt with as this act directs in caſe of militia men deſerting or abſenting themſelves from their duty when not embodied or called out into actual ſervice; and from the time of his being ſo apprehended, as aforeſaid, until he is brought before ſuch juſtice of the peace, as aforeſaid, ſuch offender ſhall be ſubſiſted at the rate of 6d. per day, from the public monies in the hands of the collector of the land tax of the county, ſtewartry, city or place, to which ſuch regiment or battalion belongs, for which ſubſiſtence ſuch juſtice is hereby required to make ſuch order upon ſuch collector, who ſhall be allowed the ſame in his accounts; and if any ſerjeant, corporal, or drummer ſhall deſert from the regiment or battalion to which he belongs, it ſhall be lawful for any conſtable or other officer of the town or place where any perſon who may be reaſonably ſuſpected to be ſuch deſerter ſhall be found, to cauſe ſuch perſon to be apprehended and taken before any juſtice of the peace living in or near to ſuch town or place, who is hereby empowered to examine ſuch ſuſpected perſon; and if, by his confeſſion, or the teſtimony of any witneſs or witneſſes upon oath, or by the knowledge of ſuch juſtice, it ſhall appear, or be found, that ſuch ſuſpected perſon is ſuch deſerter, ſuch juſtice ſhall forthwith cauſe him to be conveyed to the common gaol of the county or place where he ſhall be found, or the houſe of correction, or other public priſon in the town or

§ 2. REGULATIONS.

; and, farther, any juſtice of peace, before whom rter ſhall be convicted, may iſſue his warrant to the the regiment, or to the commanding officer, requir- One juſtice.

r near to which ſuch de- be apprehended, there to til he ſhall be demanded rſon or perſons authoriſed him, as herein after direct- hall tranſmit an account the clerk of the general of the county, ſtewartry, ce, to which ſuch deſerter d the keeper of ſuch gaol, orrection, or priſon, ſhall full ſubſiſtence of ſuch t the rate above ſpecified, ntenance during the time ntinue in his cuſtody; but entitled to any fee or re- account of his impriſon- ſuch clerk of the general receiving ſuch account, diately tranſmit a copy the colonel or command- of the regiment or bat- is county, ſtewartry, city nd alſo to the adjutant or er commanding the ſer- porals and drummers of ents or battalions; and the commanding officer of the r battalion to which ſuch ll be found to belong, or t or officer commanding , corporals and drummers, iment or battalion, ſhall, hereby required imme- n receiving ſuch copy d, to ſend any ſerjeant, r drummer, or any party ants, corporals, or drum- regiment or battalion, to the place where ſuch deſerter ſhall be ſo confined, and ſhall alſo ſend by ſuch ſerjeant, corporal, or drummer, or the ſerjeant commanding ſuch party of ſerjeants, corporals, or drummers, an order under his hand to the keeper of the ſaid gaol, houſe of correction, or priſon, requiring him to deliver ſuch deſerter to the perſon or perſons therein named, which he is hereby required to do; and the ſerjeant, corporal, or drummer, to whom ſuch deſerter ſhall be ſo ordered to be delivered, in caſe one only ſhall be ſent on ſuch duty, ſhall apply to the adjutant or ſerjeant-major of the regiment or battalion, or to the ſenior ſerjeant of the corps of the county, ſtewartry, city, or place, where ſuch deſerter ſhall be ſo confined as aforeſaid, and ſuch adjutant, ſerjeant-major, or ſerjeant, ſhall order a ſufficient party of the ſerjeants, corporals, or drummers under his command, to aſſiſt in conveying ſuch deſerter, and he ſhall be conveyed to the adjutant or ſerjeant-major of the regiment or battalion, or ſenior ſerjeant of the corps to which he belongs, in the ſame manner as before directed with reſpect to the conveying of private militia men to the adjutant or ſerjeant-major of the regiment or battalion, or ſenior ſerjeant of the corps to which they belong; and ſuch adjutant or ſerjeant-major, or ſerjeant, ſhall take ſuch deſerter before a juſtice of peace of the county, ſtewartry, city, or place to which he belongs,

§ 2. REGULATIONS.

ing them to pay 20s. to the perſon who apprehended ſuch deſerter [l].

THE calling out the militia in caſe of invaſion [m], the puniſhment for non-attendance [n], the pay and other privileges of the men turning out [o], the re-liſting of men whoſe time is near expiring [p], the duty of county lieutenants and other officers, when the militia is embodied, as to making out lifts, ballotting for men, and other matters [q], and when only part

who ſhall forthwith cauſe him to be conveyed to the common gaol, houſe of correction, or other public priſon of ſuch county, ſtewartry, city, or place, where he ſhall remain without bail or mainprize, until a court martial can and ſhall be ſummoned and held for the trial of ſuch deſerters according to the proviſions of this act, when he ſhall be delivered to the perſon or perſons named in any order to be iſſued for that purpoſe under the hand of the officer by whoſe authority ſuch court martial ſhall be ſummoned, requiring the delivery of ſuch deſerter; and all gaolers and keepers of priſons ſhall (if required ſo to do by any ſerjeant, or corporal, or drummer, employed in conveying any militia man or ſerjeant, corporal or drummer, ſo offending to the regiment or battalion to which he belongs) receive into their cuſtody, and confine ſuch offender for ſuch time as they ſhall be reſpectively ſo required as aforeſaid, not exceeding twenty-four hours; and every ſuch gaoler or keeper of any priſon, who ſhall refuſe ſo to do, ſhall forfeit the ſum of twenty ſhillings; and all ſuch ſerjeants, corporals, and drummers, while they are employed in executing ſuch duty as aforeſaid; and all other ſerjeants, corporals, and drummers, of the militia, while on any march, or employed on any duty upon which they may be commanded by any legal authority, ſhall be billetted in like manner as ſerjeants, corporals, or drummers, belonging to his majeſty's other forces employed in apprehending and conveying deſerters, are to be billeted.

[l] And be it further enacted, that the juſtice of the peace, before whom any deſerter ſhall be examined, ſhall and may iſſue his warrant to the clerk of the regiment or battalion to which ſuch deſerter ſhall belong, or (when there is no clerk) to the commanding officer, requiring ſuch clerk or ſuch commanding officer to pay, out of ſuch regiment or battalion, the ſum of twenty ſhillings, to the perſon who ſhall have apprehended ſuch deſerter; and ſuch clerk or commanding officer is hereby authoriſed and required to pay the ſame accordingly on demand.

[m] Ibid. § 107.

[n] Ibid. § 110.

[o] Ibid. § 113—115, 117, 120, 122.

[p] Ibid. § 118, 119.

[q] Ibid. § 124, 125, 127, 128.

thereof is embodied [r], the increaſe of the numbers lawful in caſe of invaſion [s], the men continuing liable to ſerve though ſuch ſupplementary militia be reduced and diſembodied by proclamation [t], the pardoning deſerters who ſurrender, and ſending them to ſerve abroad [u], balloting for ſupplementary militia [x], filling up of vacancies occaſioned by militiamen who are ſeamen entering into the navy under 43 Geo. III, c. 62, § 1 [y], theſe things are all particularly regulated. § 2. REGULATIONS.

III. WHERE the quota of any county ſhall not be raiſed within a time limited, there muſt be paid 15l [a]. ſterling annually for each man. This ſum is to be raiſed by aſſeſſment, made by the commiſſioners of ſupply at their next general meeting yearly, after the expiration of the time limited, on receipt of the certificate of the lieutenant, or of three deputy lieutenants, mentioning the deficiency. The commiſſioners are to aſſeſs the valued rent of each pariſh, or, if there is no evidence of the valued rent, according to the cuſtomary payment of the land tax [b], in proportion to the number of men in which it was deficient [c]; and when the deficiency ſhall ariſe in any particular pariſh, the aſſeſſment ſhall be made thereon [d]. If the commiſſioners of ſupply fail to make ſuch aſſeſſment, they are perſonally liable for the amount, which may be ſummarily recovered by complaint to the ſheriff or ſtewart depute at the inſtance of the lieutenant. § 3. QUOTA. Penalty. Aſſeſſment. Commiſſioners of ſupply. Commiſſioners of ſupply perſonally liable for neglect.

In cities, the aſſeſſment is to be levied as the ceſs ſtent [e]; and magiſtrates neglecting to make ſuch aſſeſſment, are perſonally liable, on ſummary complaint, at the inſtance of the collector of the land tax to the ſheriff or ſtewart depute. In cities.

[r] Ibid. § 129.
[s] Ibid. § 141.
[t] Ibid. § 149.
[u] 43 Geo. III, c. 50, § 5, 6.
[x] Ibid. § 13.
[y] Ibid. § 3, 4.
[a] By 42 Geo. III, c. 91, § 150, the penalty was 10l. But, by an after act, 43 Geo. III, c. 50, § 10, it was raiſed to 15l.
[b] § 154. [c] § 151.
[d] § 152. [e] § 155.

§ 3. QUOTA

Partly landward, partly within borough.

If the pariſh be partly landward, and partly within borough, the landward part is conſidered as part of the county or ſtewartry, and the part within the borough is included in the aſſeſſment for the borough [f].

Money to be remitted to the collector.

Such ſums muſt be remitted immediately to the collector of the land tax [g], who ſhall retain it in their hands for three months, for the purpoſe of paying bounties to any volunteers that the deputy lieutenant ſhall raiſe within that period for ſupplying deficiencies, and then they ſhall pay the balance to the receiver general of Scotland [h]. And when the whole aſſeſſment upon any place is paid to the receiver general for Scotland, it ſhall be indemnified for raiſing its quota. The receiver general, again, muſt, within ten days, certify the ſame to the treaſury, and pay the money into the exchequer, to be diſpoſed of by parliament [i].

Pecuniary penalties.

When pecuniary penalties are paid by perſons in lieu of their quotas, it is the buſineſs of the lieutenant and his deputies therewith to procure ſubſtitutes as ſoon as poſſible. And under the former acts, ſome queſtions had come before the court of ſeſſion as to the right of lieutenants to order a new levy, till the ſaid ſums had been accounted for. The court had, in general, been of opinion, that whatever action might afterwards lie againſt the lieutenant to account for the ſums received, ſtill the public ſervice could not be interrupted. The ballot muſt take place. And in the ſtatute 43 Geo. III, c. 50, § 1, it is provided, that deputy lieutenants ſhall proceed to ſupply vacancies in the militia without regard to the cauſe or continuance thereof. The vacancies are directed to be certified from time to time to the clerk of the general meetings, and by him notified to the clerks of the ſubdiviſion

Employment thereof.

Supplying vacancies.

[f] § 157.
[g] § 158.
[h] § 159. And, by § 160, if a place lies in two counties, the aſſeſſment ſhall be paid to the collector of that where the church ſtands.
[i] § 161.

meetings, and there filled up in ſeven days[k]. And if any perſon ordered to be drawn out and embodied, appear not within a month, the vacancy ſhall be ſupplied[l]. And commandants are directed, every month, to tranſmit to the juſtices of peace their quarter ſeſſions certificates of vacancies: and the ſeſſions ſhall aſſeſs 10l. for each certified to be deficient; and at every ſucceeding ſeſſions, a farther penalty of 10l. ſterling, till ſuch vacancy be ſupplied[m]. § 3. QUOTA. Aſſeſſment by the ſeſſions.

MARRIED men, having ſerved when drawn out into actual ſervice, may exerciſe trades as freely as ſoldiers and ſailors[n]. Married men.

THE ſtatute 24 Geo. II, c. 44, for protection of juſtices of peace, extends to lieutenants and their deputies acting in execution of the militia acts[o]. Protection to lieutenant and deputy.

IV. IN order to provide for the families of militia men in Scotland when called out into actual ſervice, the ſt. 44 Geo. III, c. 89, was paſſed, ordering that the families of non-commiſſioned officers, drummers, or private militia men, in Scotland, called out into actual ſervice, ſhall receive a weekly allowance of a ſum not exceeding the price of one day's labour in huſbandry, for every child born in lawful wedlock, and under ten years of age, and the ſame for the wife[p]. The juſtices of peace regulate the rate of the allowance. No allowance is to be made till the man have joined his corps, or longer than he ſhall remain in actual ſervice; nor to any wife who ſhall follow the corps, or leave her child, or depart from her home, unleſs under certificate of a juſtice or of the miniſter of the pariſh, that ſhe has gone for procuring work[q]; nor to the family of any ſubſtitute, hired man, or volunteer, § 4. FAMILIES' PROVISION. Whoſe? When? How much. Rate regulated by juſtices.

[k] § 2. [l] § 3. [m] § 4. [n] 42 Geo. III, c. 91, § 170. [o] 42 Geo. III, c. 91, § 166. As to what the proviſions of that ſtatute are, ſee Vol. I, p. 50. [p] § 1. [q] Ibid.

§ 4. FAMILIES' PROVISION. who, after being called out, ſhall marry without the conſ of the commanding officer certified previous to his marria but ſuch families muſt previouſly obtain a certificate of t inability to maintain themſelves, and of the cauſes ther The certificate muſt be ſigned by the pariſh miniſter and heritor, or one reſpectable perſon occupying land and pay rent not under 20l. ſterling, or, in cities, from a miniſter Certificate. a magiſtrate thereof[s]. Upon production of which certifi to any juſtice of the peace, he ſhall order a weekly allowa One juſtice. to be paid according to the price of labour, as fixed by juſtices at their quarter ſeſſions[t]. The juſtice of peace m ing this order muſt tranſmit the certificate to the clerk of commiſſioners of ſupply, who ſhall tranſmit the ſame to collector of the ceſs. If he neglect to do this, he is liable a penalty of 5l. ſterling for each neglect. The collecto the ceſs ſhall pay monthly to the treaſurer of the kirk ſeſ a ſum ſufficient to pay the amount of ſuch orders: for gleet of this, he is liable in a penalty of twice the amou The kirk treaſurer, again, pays allowances on the orde the miniſter of the pariſh, and muſt tranſmit to the cler the commiſſioners of ſupply ſuch orders, together with receipts of the perſons to whom the money is paid[x]. Allowance to treaſurer by quarter ſeſſions. quarter ſeſſions may grant an allowance to the treaſurer their trouble, not exceeding 2d. in the pound[y]. Com ſioners of ſupply ſhall make an aſſeſſment on lands by valued, and houſes by the rent ſet thereon by the lateſt a ment for the houſe tax in the following proportions: 1s. on every 100l. of valued rent, and 1d. ſterling on th of the rent of houſes[z]. Houſes not rated to the houſe are not to be aſſeſſed[a]. A perſon ſhall not be aſſeſſed f for his houſes and lands if they be in the ſame county; the commiſſioners may aſſeſs him in either way which ſe

[r] § 4. [s] § 5. [x] § 9. [y] § 10.
[t] § 6. [u] § 8. [z] § 11. [a] § 12.

ikely to produce the higheſt aſſeſſment[b]; one half of the aſ- § 4. FAMILIES' PROVISION.
ſſment is paid by the tenants[c]. In Edinburgh and Glaſ-
ow it is to be levied by the magiſtrates, from the heritors,
ngeſſes and inhabitants, in the manner the ceſs, ſtent, and
her public burdens are levied[d].

V. SUBSTITUTES having more than two lawful children are § 5. SUBSTI-
ot to be received; and no allowance is to be made to the TUTES.
mily of a ſubſtitute, who may at the time of inrolment falſe-
repreſent himſelf as having only two children, unleſs he
all undertake to make proviſion for his other children, to
e ſatisfaction of a juſtice of peace, in which caſe the juſtice
ay order the allowance to be paid in reſpect of his wife
nd two children under ten years of age[e].

[b] § 14. [c] § 15. [d] § 16. [e] § 22.

CHAP. V.

Of Volunteers.

§ 1. IN GENERAL.

I. THE names of volunteers ſhall be inrolled and certified to the lieutenant of the county, and by him to the lieutenancy [a]. And commanding officers ſhall make returns of their corps three times a year [b]; and thoſe only are to be deemed effective members who attend, if cavalry, twelve days, and if infantry twenty-four days in the year [c]. The commanding officer ſhall certify on roll that the corps have been inſpected, or are ready to be ſo. And volunteers duly attending exerciſe are exempted from ſerving in the militia, provided the muſter-roll be communicated to the lieutenant of the county, together with a certificate of the perſons having attended [d]. Annual abſtracts of the rolls are tranſmitted to the office of the ſecretary of ſtate [e]. Serjeants, trumpeters (or bugle men), and drummers, of volunteer corps, receiving pay, are during the war under the mutiny

Enrolling.

Exemptions from the militia.

Annual abſtracts.

[a] 39 Geo. III, c. 35. § 2.
[b] 43 Geo. III, c. 121, § 1.
[c] Ibid. § 2.
[d] 42 Geo. III, c. 66, § 3.
[e] Ibid. § 6.

§ 1. IN GENERAL.

f. And in caſe of invaſion or appearance of an enemy on coaſt, the volunteers may be called to aſſemble, and are be ſubject to the mutiny act then in force [g]: but are to tried by thoſe court martials only, which are compoſed of unteer or yeomanry officers [h]. Volunteers ſo aſſembled are be put under ſuch general officers as his majeſty ſhall ap- nt [i]. And all volunteer and yeomanry officers ſhall rank Rank. h the officers of the regular and militia forces as the ngeſt of their reſpective corps [k]. Money ſubſcribed for Stock of the corps, in whom veſted. uſe of any corps, as well as the arms and ſtores, muſical truments or other articles, are veſted in the commanding icer for the time [l]. If any perſon refuſe to pay money Fines and ſubſcriptions, recovery of. ſcribed, or required by the regulations of ſuch corps to ſubſcribed by him towards any expence of the corps, or pay any fines or penalties incurred under any rules or re- lations thereof, any one juſtice of the peace may cauſe the e, with double the amount, to be levied by diſtreſs and of his goods; and the ſum ſhall go to the general ſtock the corps, or, if there be no ſtock, it goes to ſuch pur- es as the commanding officer ſhall direct [m].

§ 2. —CAVALRY.

II. VOLUNTEER cavalry are farther exempted from duty one horſe [n], and when going to and returning from exer- are exempted from toll [o]. On deſire of volunteer cavalry aſſemble for being trained, the lieutenant of the county or deputies may make an order for that purpoſe, with con- rence of the general of the diſtrict; and any one juſtice peace ſhall iſſue precept to the conſtable to quarter the n-commiſſioned officers and men as in regular forces [p].

[f] 43 Geo. III, c. 121, § 8.
[g] Ibid. § 9.
[h] 42 Geo. III, c. 66, § 10.
43 Geo. III, c. 121, § 11.
[i] Ibid. § 12.
[k] § 13.
[l] § 14.
[m] § 14.
[n] 42 Geo. III, c. 66, § 7.
[o] Ibid. § 9.
[p] 43 Geo. III, c. 121, § 4.

CHAP. VI.

Of the Statutes passed to enable his Majesty more effectually to provide for the Security and Defence of the Realm; and for indemnifying such Persons as may suffer in their Property by such Measures as may be necessary for that Purpose.

§ I. IN GENERAL.

King's prerogative.

I. THE Britiſh defence acts refer to the king's ancient prerogative, in requiring the military ſervice of his liege ſubjects, in caſe of invaſion of the realm[a]. From the earlieſt traces of the ſtatute law of Scotland, relative to military force, it appears to have been the policy of this country, that all perſons, from the age of ſixteen to ſixty, ſhould be ready, on occaſion of emergence, to attend the call of the ſovereign, furniſhed with proper arms, according to their rank and condition. In order to make the performance of this public duty the more effectual, there are many old enactments, ſpecifying the particular manner in which individuals were to be reſpectively armed: Every man of twenty pounds rent, or ane hundred pounds of eſtate, was to be horſed and haill harnaſſed[b], as gentlemen ought to be; and of tenne

Ancient regulations.

Every man to be armed according to his rank.

[a] See above, Vol. I, p. 320.

[b] Jas. I, parl. 9, 1429, c. 120.

ound of rent, or fifty poundes in goods, was to have "hat, § 1. IN GENERAL.
orget, and a peſane, with wambraſſeris and reirbraſſers, and
loves of plate, pans, and leg ſplents at the leaſt, or, gif him Archery
kis, better [c]." It was farther ordered, that all men "buſk enjoined.
iemſelves to be archers fra they be twelve years of age; and Bow marks
at in ilk ten pounds of land there be bow marks ſpecially near near parish churches.
) paroche kirks, quairin upon halie daies men may cum and
: the leaſt ſchute thriſe about, and have uſage of archerie;
id quha ſa ufis not the ſaid archerie, the laird of the land
ill raiſe of him a wedder, and gif the laird raiſes not the
id paine, the king's ſchireff or his miniſters ſall raiſe it to
e king [d]." In like manner, it was ordained, that "wea-

[c] Ibid.
Item, that ilk zeaman, that is of
ntie pound in gudes haue a gud
ablet of ſenſe, or anc harbirgeon,
ith hat, with bow, ſchaif, ſword,
ckler, and knife, and ane zeaman
t is na archer, nor cannot draw a
w, ſall haue a gude ſuir hat for his
d, and a doublet of ſenſe, with
orde and buckler, and a gude axe,
elſe a brogged ſtaffe.
Item, it is ſtatute and ordaned, that
barronne within himſelfe ſall ſee
ordaine his men to be bodin, as
before written. And gif he dois
thin betuixt this and Martinemes,
ſchireffe ſall raiſe of ilk zeaman
t bodin, as is foreſaid, a wed-
; and of ilke gentleman, twa
dders, ſa that they be warned of
ntie daies warning at the firſt
; and of the nixt at fifteene daies
ning of ilk zeaman not bodin,
wedders, and of ilk gentleman
wedders; and at the thrid time
fifteene daies warning of the zea-
three wedders, and of ilk gentle-
a mairt, and ſwa furth fra fif-
teene daies to fifteene, quhill they be
anis lauchfully bodin, as effeiris.
Item, it is ordaned, that ilk burges
hauand fiftie poundes in gudes, ſalbe
hail attarned, as a gentleman aucht
to be. And the zeamen of lawer de-
gree, and burgeſſes of twentie pundes
in guds ſalbe bodin with hat, doublet,
or habirgeon, ſword and buckler,
bow, ſchaif, and knife. And that he
that is na bowman, haue a gude axe
and ſure weapons, as is foreſaid. And
that the baillies ſall raiſe the paine
hereof in burgh, gif it beis not keep-
ed; that is to ſay, of ilk harniſhed
man four ſhillings at the firſt, aucht
ſhillinges at the nixt, a marke at the
thrid daie, ay foorth quhill he be
weill anarmed. And of ilk zeaman
twa ſhillinges at the firſt, foure ſhil-
linges at the nixt, and aucht ſhillinges
at the thrid, and ſwa foorth, quhill
he be weill anarmed.
See alſo Jas. II, p. 13, 1456, c. 56; Jas. III, p. 6, 1471, c. 44; and p. 11, 1481, c. 80; and Jas. V. p. 6, 1540, c. 87 and 88.

[d] Jas. I, p. 1, 1424, c. 18.

§ 1. IN GENERAL. Weapon-ſhawing.

pon-ſhawing be made in ilk ſhire four times in the zeir[e]; and "ſicklike in burghs[f]," and "at ſuch days and place as ſhall pleaſe the ſherriff and baillies to burgh and to land; and that the muſters be taken by them, or by the king's commiſſioner in that part[g]." All who came to theſe weapon-ſhaws were to be enrolled, with the manner of their arms yearly[h]; and captains, one or more, were choſen in every pariſh by the ſheriff and bailie, with the king's commiſſioner in that part, with the advice of the moſt able of the ſhire, to muſter their companies on holy days before noon[i]. The military policy of Scotland ſeems to have remained under theſe laws and regulations till the Reſtoration, when this part of the prerogative, which had been queſtioned during the ſtruggles, was recognized by act 1661, c. 5.

§ 2. 43 GEO. III, c. 55, 96. Lieutenants and their deputies.

II. THE Britiſh defence ſtatutes are to be executed by the lieutenants and deputy lieutenants, who, as already mentioned, have come in place of the Engliſh commiſſioners of array, and what in Scotland was the military province of the ſheriff, bailie, and king's commiſſioner in that part.

Orders for returning liſts.

THE general meetings of the lieutenancy are directed to iſſue orders for returning liſts to the deputy lieutenants of men from 17 to 55[k]; and conſtables are to direct houſeholders to do, in the form of a ſchedule contained in the act[l]. Theſe Four claſſes. liſts are divided into four claſſes: 1ſt, unmarried men, between 17 and 30; 2d, between 30 and 50; 3d, married men from 17 to 30, with only two children; and, 4th, all other perſons[m].

[e] Jas. I, p. 2, 1424, c. 44.
[f] Jas. I, p. 3, 1425, c. 60.
[g] Jas. V, p. 6, 1540, c. 85.
[h] 1540, c. 89.
[i] Ibid, c. 91.
[k] § 3. [l] § 7.
[m] § 10. Except infirm perſons, alſo judges, clergymen, licenſed teachers of any ſeparate congregation, in holy orders, and not exerciſing any other trade except that of a ſchoolmaſter, nor any of the people called quakers, nor any houſekeeper practiſing as a medical man, nor any officer of the army, militia, navy, marines, ſoldier, ſeaman, volunteer, nor any ſuch deputy lieu-

juſtices are empowered to appoint deputies to quak- § 2.
:n any ſuch happen to be conſtables, or otherwiſe 43 GEO. III, c. 55, 96.
act in execution of this act [n].

king may direct pariſhes to be provided with arms Keeping the arms.
iutrements, which ſhall be kept as the lieutenant or
ieutenant ſhall direct, under the care of the elders,
:s, and other parochial officers; any one of whom
to obey ſhall forfeit a ſum not exceeding [o].
ience of keeping the arms is to be defrayed by the Aſſeſſment on the pariſh.
nd any two deputy lieutenants may aſſeſs the pariſh
ame [p]. The training [q], appointment and rank of
, nonattendance [s], penalties, allowance for attend-
nproper behaviour during exerciſe [u], nondelivery of
teps to be taken in caſe of invaſion [a], embodying the
part [b], pay of officers and men when out [c], all theſe,
er matters, are regulated in the reſpective clauſes.

wives and families of perſons enrolled are entitled to Wives and families.
: relief as thoſe of militia men.

and forfeitures, incurred under this act, may be Fines and forfeitures.
r warrant of any one juſtice of peace, by diſtreſs and

aſtable, or peace officer, or
olmaſter acting in execu-
s act. § 12.
[o] § 25.
As is ordered by the ſtat-
viding relief to the families
nen called out in actual ſer-

[r] With militia officers youngeſt of the ſame claſs.
[s] § 35. [t] § 37.
[u] § 38. [x] § 42.
[a] § 44, 45, 46, 47, 48, 49.
[b] § 52.
[c] § 57.
[d] § 40.

CHAP. VII.

Of Seamen.

§ 1. IN GENERAL.

I. NO liſted ſeamen ſhall be taken out of his majeſty's ſervice by any proceſs other than for ſome criminal matter, unleſs affidavit be firſt made, that the debt or damage amounts to 20l [a].

But the plaintiff may, on notice firſt given to the defendant, enter a common appearance and proceed to judgment and outlawry, and have execution other than againſt his body [b].

No court martial muſt puniſh or try any offence committed by any ſeaman in his majeſty's ſervice, which ſhall not be committed on the main ſea, or in great rivers beneath the bridges, or in a haven or creek within the juriſdiction of the admiralty; except in the caſe of ſpies, or of mutiny and deſertion, or diſobedience, or of offences committed on land in foreign countries [c].

[a] 31 Geo: II, c. 10, § 28. [b] § 22. [c] c. 33, § 40.

§ 1. IN GENERAL.

SEAMEN who have been employed in the king's ſervice ce the acceſſion of king George the ſecond, and not de- ted, may ſet up and exerciſe ſuch trades as they are apt ; in any town or place of Great Britain or Ireland, with- t moleſtation (except in Oxford or Cambridge); and if any rſon is ſued thereupon, and the plaintiff is caſt, ſuch per- ı ſhall have double coſts [d].

Where they may exerciſe trades.

A SEAMAN, inſtead of being committed to the houſe of rection, for default of paying the penalty for ſwearing, ll be put in the ſtocks for one hour for every ſingle offence, l for any number of offences of which he ſhall be convict- at one and the ſame time, two hours [e].

Convicted of ſwearing.

No ſeamen employed in his majeſty's ſervice, ſhall have ſettlement in any pariſh, port town, or other town, by ivery and publication of a notice in writing, unleſs it be r his diſmiſſion out of his majeſty's ſervice [f].

Settlements.

THE treaſurer, comptroller, ſurveyor, clerk of the acts, or of the commiſſioners of the navy may puniſh ſeamen others, making diſturbances in the yards or offices, and bind them to their good behaviour, and to appear at the t aſſizes, or general quarter ſeſſions, to be proſecuted for h offence [g].

Diſturbance in the yards.

THE perſonating of ſeamen in his majeſty's ſervice, their cutors or adminiſtrators [h], or outpenſioners of Greenwich pital [i], is declared to be felony without benefit of clergy; t is, in common language, a capital offence. And for the re effectual bringing the offenders to juſtice, the treaſurer, ptroller, ſurveyor, clerk of the acts, or any commiſſioner

Perſonating ſeamen.

[d] 22 Geo. II, c. 44; 3 Geo. III, c. 8.
[e] 29 Geo. II, c. 21, § 5.
[f] 8 Will. c. 11.
[g] 1 Geo. ſt. 2, c. 25, § 1, 2.
[h] 31 Geo. II, c. 10, § 4.
[i] 3 Geo. III, c. 16.

§ 1. IN GENERAL.

of the navy, may act as juſtices in apprehending any perſon charged with forging, or counterfeiting, or procuring to be counterfeited, any letter, ticket, latter will, power of attorney, &c. or uttering the ſame as true, in order to receive wages due to any ſeaman, or other perſon in his majeſty's ſervice [k].

OUTPENSIONERS of Greenwich hoſpital, in order to receive their penſion half yearly, as it ſhall become due, ſhall, together with the printed bill, delivered to them by the commiſſioners, produce a certificate under the hand of the miniſter and church wardens [l], where they reſide, that ſuch perſon is, to the beſt of their knowledge and belief, the perſon named in ſuch bill.

§ 2. SEAMEN IN THE MERCHANT SERVICE.

II. CONCERNING ſeamen in the merchant ſervice, it is enacted, by the 2 Geo. II, c. 36, that no maſter of a ſhip ſhall proceed on a voyage, without an agreement in writing with each mariner (apprentices excepted), to be ſigned by ſuch mariner, for wages; and by 31 Geo. III, c. 39, the ſame is extended to ſeamen employed in the coaſting trade, on pain of 5l. for each mariner, on conviction before one juſtice by the oath of one witneſs, to be levied by diſtreſs; for want of diſtreſs, to be committed till paid [a].

One juſtice.

One witneſs.

Deſerting.

AND if the mariner deſerts after he hath ſigned the agreement, he ſhall forfeit the wages due to him at the time of deſerting; and on application from the maſter, owner, or commander, of the ſhip, ſuch juſtice may cauſe him to be apprehended, and if he ſhall refuſe to proceed on the voyage, without ſufficient reaſont o the ſatisfaction of the juſtice, the ſaid uſtice ſhall commith im to the houſe of correction,

[a] Stat. c. 30, § 5.

[k] the miniſter and elders.

[l] 2.

here to be kept to hard labour, not exceeding thirty days, or leſs than fourteen days [b].

§ 2. SEAMEN IN THE MERCHANT SERVICE.

AND if any ſeaman abſent himſelf from his ſhip without ave, he ſhall forfeit for every day's abſence two days' pay Greenwich hoſpital, to be deducted by the maſter out of s wages; the ſame to be entered in a book, and ſigned by e maſter and two officers of the ſhip; and the ſame to be id over to the officer who collects the 6d. a month deduct- out of ſeamens' wages, for the ſaid hoſpital [c].

Abſenting himſelf without leave.

AND if any ſeaman not entering into the king's ſervice, all leave his ſhip before he hath a diſcharge in writing; he all forfeit one month's pay in like manner [d].

AND the maſter ſhall pay the ſeaman's wages, if demand- , in thirty days after the ſhip is entered in the cuſtomhouſe, at the time of diſcharge, which ſhall firſt happen, deduct- g out of ſuch wages the aforeſaid forfeitures; on pain of s. to ſuch ſeaman, to be recovered in like manner as his ages [e].

III. EVERY petty officer and ſeaman or landman, non- mmiſſioned officer of marines, and marine [f], or boatſwain, nner, or carpenter [g], ſerving or entering on board any veſ- l, may allot a certain part of his monthly pay to the main- nance of his wife, children, or mother; every petty officer d non-commiſſioned officer of marines, boatſwain, gunner d carpenter, one half of their pay; every able bodied ſea-

§ 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.

[b] 2 Geo. II, c. 36, § 3, 4; 31 Geo. I, c. 39, § 3.
[c] 2 Geo. II, c. 36, § 3, 9; 31 Geo. I, c. 39, § 4, 7.
[d] 2 Geo. II, c. 36, § 6; 31 Geo. I, c. 39, § 4, 10.
[e] 2 Geo. II, c. 36, § 7; 31 Geo. III, c. 39, § 5.
[f] 35 Geo. III, c. 28, § 1.
[g] Ibid. c. 95.

§ 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.

man, 5d. per day; every ordinary ſeaman, 4d. per day; and every marine, 3d. per day; to be paid every twenty-eight days, as directed by the act. Volunteers, at the time of entering, may allot a part of their pay to be paid as ſpecified by the act; to be paid by the receiver general of the land tax of the county or city, or collector of the cuſtoms or exciſe, neareſt the reſidence of ſuch wife or mother [c]. So alſo

[c] The regulating officer is to make out three declarations of allotment, and three orders of payment, to be triplicates of each other, in the following form:

No. 1.—I A. B. petty officer, or ſeaman, landman, non-commiſſioned officer of marines, marine, do hereby declare, that I, having a wife and one child, a boy, and children of whom are boys, or mother, living at in the county of entered this day to ſerve in his majeſty's navy, now ſerving on board his majeſty's ſhip , have allotted per day, out of my wages or pay, for the maintenance of my wife and child or children, or mother, and I do hereby direct you to pay or cauſe to be paid to C. B. my wife, or my mother, living in the place and county aforeſaid, at the end of every twenty-eight days from the date hereof, the ſum of being at the rate of per day out of the wages or pay to grow due to me as a in his majeſty's navy, a duplicate hereof having already been tranſmitted to you, ſigned by three of the commiſſioners of his majeſty's navy, upon her pruducing a certificate, under the hands of the miniſter and the churchwardens or churchwarden, or the elders or elder, of the pariſh where ſhe reſides, that, to the beſt of their knowledge, the ſaid C. D. is my wife, or my mother, or, in the event of the death of my wife, pay the ſum aforeſaid to the perſon who ſhall, by the miniſter and churchwardens or churchwarden, or elders or elder, of the pariſh where my ſaid wife reſides, be appointed to receive the ſame, for the maintenance of my child or children. Dated at on board his majeſty's ſhip this day of

Signed A. B.

Witneſs (if on ſhore) T. Bowling, lieut. of his majeſty's navy.

(if on board) D. E. capt.
F. G. lieut. and ſigning officer.

To the treaſurer of his majeſty's navy.
To the receiver general of the land tax of
To the collector of the cuſtoms of the port of
To the collector of the exciſe at
To the clerk of the cheque at

Signed H. L. K. L. M. N. } Commiſſioners of his majeſty's navy.

which being numbered and dated, and the blanks filled up, ſuch ſeaman or landman ſhall ſign the ſame, and ſuch regulating officer ſhall alſo ſign as a witneſs: and if ſuch wife or mo-

ty officers or other ſeamen may aſſign theirs in like man- § 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.
r.

THE declarations and orders are to be examined with the s by the navy boards, and one is to be delivered to the e or mother, another to the receiver general or collector, l a third to the treaſurer of the navy [d]. Within twenty-ht days, the perſons to whom ſuch orders are ſent, are to mine the ſame, and alſo certificate of miniſters, and, on ng ſatisfied (by the oath of the wife or mother, if neceſ-) he ſhall immediately pay the ſum *gratis* [e].

F the wife die, leaving children under fourteen years of , the miniſter and churchwarden where ſuch wife reſided he time of her death, ſhall certify to the commiſſioners the navy the day of her death; and, if children are left, ages of thoſe under fourteen, as near as they can, and r many are boys; and ſhall alſo certify their intention of ointing a fit perſon, reſident within ſuch pariſh, to receive t part of the father's wages allotted for the maintenance his children, in caſe of his wife's death; and, along with h certificate, ſhall alſo tranſmit the triplicate of the de-ration and order which was in her poſſeſſion at the time her death; and if the commiſſioners of the navy are ſatis-l of the truth thereof, and that the father is ſtill alive, and he ſervice of his majeſty, they ſhall make out three cer-cates and orders, which ſhall be triplicates of each other, the form as below [a]. And ſhall ſend the ſame to the

Wife dying, and leaving children under 14.

Three certificates and orders to be made out.

'ſhall then attend in perſon, ſuch er ſhall deliver to her one of the ſicate orders, and ſhall ſend the r two to the commiſſioners of the r; but if ſuch wife or mother l not attend, ſuch officer ſhall ſend he ſaid triplicates to the ſaid com-ioners, and ſhall ſpecify and men-tion, oppoſite to the name of every man ſo entered, whether he has allotted any part of his pay as aforeſaid, and to what amount, together with the date of ſuch order § 2.

[d] 35 Geo. III, c 28, § 4.

[e] Ibid. § 5.

[a] No. 1.—We the miniſter,

§3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.

miniſter or churchwarden of the pariſh where the wife died, who ſhall fill up the blanks and ſign the ſame, and having procured two juſtices of the county wherein ſuch pariſh lies

ter, and churchwardens or churchwarden of the pariſh of in the county of do hereby certify and declare, that wife of a petty officer, or ſeaman, landman, non-commiſſioned officer of marines, marine, ſerving in his majeſty's navy, died on the day of and was buried in the ſaid pariſh, where ſhe had reſided months, or years, previous to her death. And we further certify and declare, that there is, or are, living in this pariſh, a child, or children, under the age of fourteen years, of the aforeſaid late the huſband of the aforeſaid deceaſed, who is a boy, or girl, of whom are boys, and we have appointed of in this pariſh, to receive ſuch allowance as the aforeſaid the father has allotted out of his wages or pay, due or to become due for his ſervice in the navy, for the maintenance and ſupport of his ſaid child, or children, in the event of the death of his wife: And we requeſt that you will give the neceſſary order, that the wages of pay of the father ſo allowed as aforeſaid ſhall and may in future be paid to the ſaid for the maintenance and ſupport of the child, or children, of the ſaid under our inſpection and direction. Dated at this day of

Signed A. B. Miniſter.
C. D.
E. F. Churchward.

To the Commiſſioners
his Majeſty's Navy.

We and two of his majeſty's juſtices of the peace in and for the county of do hereby certify and atteſt to the commiſſioners of his majeſty's navy, that the facts ſet forth in the above certificate are true, to the beſt of our knowledge and belief, and that the ſaid named therein is a fit and proper perſon to receive the wages allotted by the above for the maintenance and ſupport of his child, or children, in the event of the death of his wife; and we do hereby approve of him in that reſpect. Dated at this day of

Signed G. H. } Juſtices of peace
I. K. } for the county of

London, the day of

We approve of the above, and allow the ſame, and order the payment of that part of the wages allotted by the above mentioned for the maintenance and ſupport of his child, or children, in the event of the death of his wife, to be paid to the above named for that purpoſe.

Signed L. M. } Commiſſioners of the
N. O. } Navy.
P. Q. }

To the Treaſurer of the Navy.
the Receiver General of the Land Tax of
the Collector of the Cuſtoms at the port of
the Collector of the Exciſe at
the Clerk of the Cheque at

to atteſt the ſame, ſhall return the ſaid three triplicates to the commiſſioners of the navy, who ſhall, on the receipt thereof, examine the ſame, and, if found right, ſhall mark each of the triplicates with the ſame number with which the original declaration and order was numbered; and three of the ſaid commiſſioners ſhall date and ſign their allowance thereof, and ſhall addreſs each of them to the ſame public officer to whom the original was addreſſed, who ſhall tranſmit one of them to the perſon ſo appointed by ſuch miniſter and churchwarden, and approved by the juſtices, together with the original declaration and order which was ſent to them as aforeſaid; and another thereof ſhall be tranſmitted to the treaſurer of the navy, or other public officer appointed to pay the ſame, as the caſe may be; and the third ſhall be delivered to the treaſurer of the navy [b].

§ 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.

And at the end of twenty-eight days or more, from the laſt payment made to the wife who ſo died as aforeſaid, or from the date of the original declaration and order in caſe ſhe has received no payment thereon, the perſon ſo appointed may apply to ſuch public officer to whom the ſame is addreſſed, for payment of what may be due thereon, and ſhall then produce the original declaration and order, and the certificate of the miniſter and churchwarden, and atteſtation by the juſtices, and allowance by three commiſſioners as aforeſaid; and ſhall alſo deliver a certificate from the miniſter and churchwarden, ſpecifying that there is a child, or the number of children under fourteen then living in their pariſh, diſtinguiſhing how many are boys, and their ages, as near as they can, and ſhall in all things proceed in the ſame manner as before directed; and ſuch payment ſhall be continued ſo long as all or any one of ſuch children ſhall remain under fourteen, or the father ſhall live and continue in the

Perſons appointed to receive pay for children, may apply for the ſame, producing certain papers.

[b] §

§ 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.

king's ſervice; except as herein after excepted, where no demand ſhall have been made within ſix months [c].

Seamen, &c. on promotion may increaſe their pay to their families.

AND if any ſuch ſeaman, landman, or marine ſhall be promoted, he may increaſe the allowance out of his pay to his wife, children, or mother, to the amount allowed to his rank as aforeſaid; and the ſame rules and regulations ſhall be obſerved as before is directed and preſcribed [d].

Payments to be made for 28 days at a time, except in caſe of death, &c.

AND all ſuch payments as aforeſaid ſhall be by even monthly payments of twenty-eight days, and not for any part of a month, except in the event of the death of ſuch wife, or death or diſcharge of the perſon ſerving, or his abſenting himſelf, in which caſe the ſame ſhall be paid up to the day of ſuch death or diſcharge, or his quitting the ſervice [e].

Orders to be irrevocable, except in certain caſes.

AND every ſuch order ſo granted ſhall be irrevocable, and ſhall continue and remain in force during the whole time ſuch perſon ſhall be entitled to wages, except revoked, or ſhall become void in manner hereinafter mentioned [f].

Wives, &c. to appear perſonally, unleſs diſabled.

AND the wife or mother, or perſon appointed to receive ſuch pay, ſhall appear perſonally to receive the ſame, unleſs diſabled by bodily infirmity, the ſame to be certified by the miniſter and churchwarden where ſuch perſon reſides, or by the phyſician, ſurgeon, or apothecary attending her or him, in which caſe, the ſame ſhall be paid to her or his order in writing, upon producing the original order [g].

Wife dying, order is void, if demand is not made in ſix months.

AND where no demand ſhall be made by virtue of any ſuch original order for ſix calendar months after the date when ſigned by the commiſſioners of the navy, in the event of the death of the wife, the ſame ſhall be void [h].

[c] § 7. [d] § 8. [e] § 9. [f] § 10. [g] § 11. [h] § 12.

AND if any ſuch regulating officer, or commander of any h veſſel, ſhall unneceſſarily neglect or delay to tranſmit the navy board ſuch liſts as aforeſaid, or to tranſmit ſuch clarations and orders as aforeſaid, he ſhall forfeit 50l. to recovered as penalties againſt the laws of cuſtoms or ex- e, and to be paid to the perſon ſuing or proſecuting for the ne[i]. § 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES. Officer's neglect, &c.

AND if the perſon to whom any ſuch order ſhall be ad- ſſed, ſhall not have public money in his hand ſufficient to ſwer the ſame, and ſhall refuſe payment, he ſhall appoint ky, within fourteen days, for the payment thereof. And complaint ſhall be made to the ſaid commiſſioners, of any neceſſary delay in the payment of ſuch allowance as afore- d; or that any perſon employed herein hath taken any fee reward, three commiſſioners may fine any ſuch offender t exceeding 50l. to be recovered and applied in manner reſaid[k]. Perſons to whom orders are addreſſed, &c. Delaying payment, or taking fees.

AND if by any neglect or delay in making any ſuch returns aforeſaid, any over-payment ſhall be made to any ſuch fe, mother, or children, the ſame ſhall be deducted from ſalary or pay of the officer or perſon making ſuch de- lt, and ſhall be applied in replacing the ſum ſo overpaid[l]. Over-payments to be made good by defaulters.

AND if any perſon who ſhall have allotted a part of his ges as aforeſaid, ſhall be deſirous to revoke the ſame, he y do ſo upon his declaring ſuch his intention, and actually voking the ſame by a writing under his hand addreſſed to e commiſſioners of the navy, accompanied with a certifi- te from the miniſter and churchwarden of the pariſh where s wife ſhall reſide, declaring, that, in their opinion, ſuch rſon has juſt and reaſonable cauſe for ſuch revocation; d if ſuch commiſſioners ſhall be ſatisfied thereof, they ſhall Orders for payment to wives from miniſters, &c.

[i] § 13. [k] § 14. [l] § 15.

§ 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.

give notice to the treaſurer of the navy, or other public officer to whom the order of payment was addreſſed, directing him to ſtop all future payment thereon, until ſuch perſon ſhall make another order of payment in manner aforeſaid [m].

If wives deſert their children, &c. other perſons may be appointed.

AND if any ſuch wife as aforeſaid ſhall deſert, or otherwiſe neglect and leave unſupported and maintained any ſuch child under fourteen, and who ſhall for one month become chargeable to any pariſh, the miniſter and churchwarden of ſuch pariſh may certify the fact to the commiſſioners of the navy, and alſo their intention to appoint a proper perſon to receive, and apply to the uſe of ſuch child, the pay ſo allowed for the ſupport of her and ſuch child; and if ſuch commiſſioners be ſatisfied therewith, they ſhall proceed to appoint a proper perſon to receive ſuch pay in the ſame manner as if ſuch wife had died [n].

Navy board to communicate the death of perſons, &c. on penalty of 20l.

AND as ſoon as it ſhall appear to the commiſſioners of the navy, that any perſon who has allotted a part of his pay as aforeſaid, is dead, or has quitted the king's ſervice, they ſhall communicate the ſame to ſuch public officer as aforeſaid, by whom ſuch allotment of wages was directed to be paid, directing him to ſtop all future payments; and ſuch public officer ſhall, within two days after the receipt thereof, acknowledge ſuch receipt by letter to the ſaid commiſſioners, on the penalty of 20l. to be levied as aforeſaid [o].

Miniſter, &c. to give notice of the death of wives, &c.

AND as ſoon as it ſhall come to the knowledge of the miniſter or any churchwarden of any pariſh, that the wife or mother of any perſon receiving ſuch allowance as aforeſaid is dead, they, or one of them, ſhall immediately give notice thereof by letter to the commiſſioner of the navy, or other public officer from whom ſhe received ſuch allowance, who

[m] § 16. [n] § 17. [o] § 18.

§ 3. ALLOTMENT OF PAY TO SEAMEN'S FAMILIES.

ſhall not make any further payment until he receive further directions from the commiſſioners of the navy thereon [p].

Payments to be made without deduction, &c.

AND all allotments of wages to be paid in purſuance of this act, ſhall be fully paid, without deduction, although a part thereof be in fractions of the ſmalleſt denomination; and every perſon withholding any part thereof, under any pretence whatſoever, ſhall forfeit 20l. to be recovered and applied in manner aforeſaid [q].

Letters to be free of poſtage.

AND all letters or packets ſent by the caſhier of the navy, or forwarded by him in the execution of this act, ſhall be under covers, with the words PURSUANT TO ACT OF PARLIAMENT, THIRTY-FIFTH GEORGE THE THIRD, printed thereon, and he ſhall write his name under the ſame. And if he ſhall ſend under any ſuch cover any writing, paper, or parcel, other than thoſe relating to the execution of this act, he ſhall forfeit 100l. to be recovered and applied in manner aforeſaid [r].

Penalty of ſending other things under ſuch covers.

Forging orders for payment, &c.

AND if any perſon ſhall make, forge, or counterfeit any ſuch declaration or order, or any certificate or receipt herein before deſcribed or mentioned, or publiſh the ſame in order to enable any perſon to obtain any ſuch wages ſo allotted as aforeſaid, he ſhall be guilty of felony, without benefit of clergy [s].

[p] § 19. [q] § 25. [r] § 26, 27. [s] § 30.

CHAP. VIII.

Of Manufactures.

§ 1. IN GENERAL.

I. OUR ancient ſtatute book contains many enactments for the encouragement of trade and manufactures, that are more creditable to the good intentions than the enlightened views of the legiſlature. Theſe need not be here taken notice of. The moſt important duties incumbent on juſtices of peace, in relation to the manufactures, have been already treated of at large under the chapter of Maſter and Servant. And the duties that are payable thereon, as a matter of revenue, belong to the exciſe and cuſtoms. Touching the linen and other manufactures, however, there are ſome regulations which do not fall under thoſe heads, and in relation to which juſtices of peace are clothed with juriſdiction. Theſe ſhall be ſhortly taken notice of.

§ 2. ARTICLES OF UNION.

II. HERE it may only be neceſſary to obſerve in general, that, by the ſixth article of the Union, it was provided, that all parts of the united kingdom, for ever, from and after the Union, ſhall have the ſame allowances, encouragements, and drawbacks, and be under the ſame prohibitions, reſtrictions, and regulations of trade, and

) the ſame cuſtoms and duties on import and ex- § 2.
nd that the allowances, encouragements, and draw- ARTICLES OF UNION.
prohibitions, reſtrictions, and regulations of trade,
cuſtoms and duties on import and export ſettled in
when the Union commences, ſhall, from and after
on, take place throughout the whole united kingdom,
g and reſerving the duties upon export and import
particular commodities, from which any perſons, the
of either kingdom, are ſpecially liberated and ex-
by their private rights, which, after the Union, are
in ſafe and entire to them, in all reſpects as before
:: And that, from and after the Union, no Scots
arried into England, ſhall be liable to any other du-
ier on the public or private accounts, than theſe du-
which the cattle of England are or ſhall be liable
he ſaid kingdom. And ſeeing, by the laws of Eng-
:re are rewards granted upon the exportation of cer-
ls of grain, wherein oats grinded or ungrinded are
reſſed, that, from and after the Union, when oats
ſold at fifteen ſhillings ſterling per quarter, or under,
all be paid two ſhillings and ſixpence ſterling for
iarter of the oat-meal exported in the terms of the
ıereby, and ſo long as rewards are granted for ex-
ı of other grains, and that the bear of Scotland have
: rewards as barley. And in reſpect the importation
al into Scotland, from any place beyond ſea, would
diſcouragement to tillage, therefore, that the pro-
, as now in force by the law of Scotland, againſt
tion of victual from Ireland, or any other place be-
ı, into Scotland, do, after the Union, remain in the
:ce as now it is, until more proper and effectual ways
ded by the parliament of Great Britain, for diſcour-
ıe importation of the ſaid victual from beyond ſea.
' the fourteenth article, it is provided, that the king-
Scotland be not charged with any other duties laid
ıe parliament of England before the Union, except
ſerted in the treaty.

Of the Linen Manufactures.*

§ 1. INSTITUTION OF TRUSTEES.

I. THE manufacture of flax was more cultiv land than the woollen. And that the lations made for the encouragement of the former ſucceſsful, the ſtatute 13 Geo. I, c. 26, § 18, enacte and may be lawful, to and for his majeſty, his h ceſſors, by letters patent under the great ſeal, the treaty of Union to be kept in Scotland in great ſeal thereof, to nominate and appoint an perſons reſident in Scotland, not exceeding th twenty-one, to be truſtees for overſeeing, direct ter improving the ſaid linen and hempen manuf in that part of Great Britain called Scotland, w the ſaid truſtees, or any number of them, by th patent to be determined, to aſſemble at ſuch pla and to make ſuch rules and orders for the imp

he ſaid manufactures, and for preventing abuſes therein, as hey ſhall think expedient, conſiſtent with the true intent nd meaning of this act, and with the laws and ſtatutes of he realm. § 1. INSTITUTION OF TRUSTEES.

THE powers of the truſtees thus conſtituted, are, in gen- ral, to licenſe and appoint proper perſons, in ſuch places of Scotland as they ſhall judge moſt convenient, to view, examine, lap up, mark, and ſtamp, all ſuch linen cloth as ſhall e expoſed to ſale: They, likewiſe, or any five or more of hem, may authorize perſons, by writing under their hands nd ſeals for that purpoſe, (which may alſo be done by warant under the hand and ſeal of one or more juſtice or juſices of peace, or of any magiſtrate within any borough), to earch, in the day time, all warehouſes, &c. for unſtamped loth. Power of truſtees. Any one juſtice. Search-warrant.

THE truſtees, too, or any five or more of them, may give ich particular names and denominations as they ſhall think roper, for diſtinguiſhing the ſeveral pieces of cloth of difrent ſorts, breadths, and lengths. Naming the cloth.

ANY perſon or perſons aggrieved by the juſtices of peace, r other magiſtrates, refuſing or neglecting to execute the owers conferred upon them by this act of 13 Geo. I, c. 26, ay, with the approbation of the truſtees, or any five or ore of them, to be ſignified in a certificate under their ands, proſecute ſuch juſtice or juſtices of peace, magiſtrate, r magiſtrates, before the court of juſticiary at Edinburgh, r in the circuit-court of juſticiary for the diſtrict within hich the offence was committed. Juſtices, &c. neglecting to execute the act.

AND, by the ſtatute 24 Geo. II, c. 31, for explaining, mending, and enforcing, the foreſaid act of 13 Geo. I, the omptroller of the cuſtoms in Scotland, or his deputy, is or-

§ 1. INSTITUTION OF TRUSTEES.

dained, without fee or reward, to deliver, on demand, in the month of December yearly, an account to the truſtees of all flax-ſeed, hemp-ſeed, yarn, cloth, and pot-aſhes, &c. imported into, and exported out of, Scotland, diſtinguiſhing the ſeveral ports from and to which the ſame ſhall be ſhipped. It is enacted, likewiſe, by the ſame ſtatute, that all contracts and ſecurities entered into by authority of the truſtees, and all obligations taken for the faithful performance of any office or matter relative thereto, ſhall and may be taken in the name of their ſecretary, and his ſucceſſors in office, for the uſe of the fund eſtabliſhed for encouraging the linen manufacture in Scotland; and all diligences and ſuits, in conſequence of ſuch contracts, &c. may be iſſued and carried on in the name of the ſaid ſecretary.

THIS act 13 Geo. I, c. 26, is the principal one touching this manufacture. It is entitled, "an act for better regulation of the linen and hempen manufactures in that part of Great Britain called Scotland." Offences under this act are triable by juſtices of peace [b]. But there are other ſtatutes alſo, and it may be proper to give a ſummary of all of them under certain general heads.

§ 2. LINTSEED AND HEMPSEED.

II. LINTSEED or hempſeed, bad, mixed, damnified, ſhort, or ill cleaned, prohibited to be imported into Scotland, under the pain of forfeiture, and 3l. for every hogſhead; unleſs ſufficient proof ſhall, immediately upon landing thereof, be brought before ſome juſtice of peace, or other magiſtrate, that the damage was received at ſea; in which caſe, ſufficient ſecurity to be found to the truſtees, that the ſeed ſhall not be ſown, but ſhall be exported or made into oil, under the penalty of 5l. the hogſhead [c].

[b] Except the counterfeiting the ſtamps or marks of private dealers, which is puniſhable as forgery.

[c] 13 Geo. I, ſect. 1; and 24 Geo. II, ſect. 1, 2, 6, and 7.

§ 2. LINTSEED AND HEMPSEED.

BAD, mixed, damnified, ſhort, or ill cleaned lintſeed or hempſeed, is prohibited to be ſold or expoſed to ſale, under the pain of forfeiture of the lintſeed, or the price thereof, and a ſum not exceeding 5l. nor leſs than 5os. for every hogſhead. And every perſon ſelling ten pecks or more to one perſon at one time, is to deliver to the buyer a ſubſcribed certificate, expreſſing the quantity and price, and, if foreign, the port from whence imported, name of the country where it grew, and year of the growth; and, if Britiſh, the year of its growth, and name of the county where it grew, under a penalty not exceeding 5l. nor leſs than 5os. for every hogſhead. And if the ſeed ſhall be of a different growth or age from what is expreſſed in the certificate, the ſeller forfeits the like penalty, and likewiſe the ſeed, or the price thereof[d].

SERVANTS of dealers in lintſeed or hempſeed muſt declare what they know of their maſters tranſgreſſing. And, in caſe of refuſal, are to be impriſoned[e].

Scotland, damnified lintſeed of.

LINTSEED or hempſeed, of the growth of Scotland, bad, ſhort, damnified, or otherwiſe unfit for ſowing, not to be forfeited, provided the proprietor, before ſelling or expoſing to ſale, find ſecurity to export, or make it into oil[f].

By what meaſure.

ALL lintſeed and hempſeed is to be ſold by the Linlithgow barley meaſure ſtreaked. The meaſure is to be firſt ſtamped by the dean of guild of ſome royal borough, with the mark of the borough, and the words Linlithgow barley meaſure, under the pain of forfeiture of the meaſure, and 40s.[g]

STAMPMASTERS, riding-officers, ſurveyors, or other officers, acting under the authority of the truſtees, may, with

[d] 13 Geo. I, c. 25, § 2, 3; 24 Geo. I, c. 31, § 5.
[e] 13 Geo. I, c. 25, § 15.
[f] 24 Geo. II, c. 31, § 3.
[g] § 4.

§ 2. LINTSEED AND HEMPSEED. their aſſiſtants, ſearch for and ſeize all bad, ſhort, damniſied, mixed, or ill-cleaned lintſeed and hempſeed, and detain it till tried. And if it ſhall be proved, that application hath been made for leave to export, or make into oil, any ſeed that ſhall be ſeized, ſuch ſeed is not to be returned till ſecurity be actually found [h].

§ 3. LINT, OR FLAX AND HEMP, AND FLAX-RAISERS. III. FLAX and hemp is to be ſold by the ſtone, conſiſting of 16 lb. avoirdupoiſe. And flax-raiſers and hecklers are to affix their names and places of abode on every matt or quantity of flax ſold or expoſed to ſale, under the penalty of 5l. for every offence [i].

No perſon is to ſell, or expoſe to ſale, in the ſame matt or package, flax or hemp of different quality and fineneſs, under the penalty of 5l. for every ſuch matt or package. This penalty is not to extend to a ton, or any larger quantity ſold to one perſon at one time [k].

§ 4. HECKLE-MAKERS, HECKLES, AND HECKLERS. IV. HECKLERS muſt affix their names and places of abode on every matt or quantity of flax by them ſold, under the penalty of forfeiting, for every offence, a ſum not exceeding 5l. ſterling [l].

Name of the maker. EVERY maker of heckles muſt mark on every heckle his chriſtian name, ſirname, and place of reſidence, under the pain of forfeiting the heckles, and a ſum not exceeding 20s. nor leſs than 10s. for each [m].

Liberty to hecklers. EVERY maker of heckles, and heckler or dreſſer of flax or hemp, may exerciſe his trade within any city, town, corporation, burgh, or place in Scotland, without being hindered by any perſon whatever, and without being chargeable or

[h] 24 Geo. II, c. 31, § 6, 7.
[i] Ibid. § 8.
[k] Ibid. § 9, 10.
[l] Ibid. § 8.
[m] § 15.

h any entry-money, or other duty whatever, for t of his following his ſaid trade [n]. § 4. NECKLE-MAKERS, &c.

niform ſtandard reel of Scotland is to be 2½ yards, ; in circumference. Reels not made according to : to be broke, burnt, and utterly deſtroyed [o]. Every ng, ſelling, expoſing to ſale, or buying any reel ig to the ſaid ſtandard, forfeits, beſides the reel, xceeding 40s. nor leſs than 10s. for each reel [p]. § 5. WHEELS AND REELS.

aker of wheels or reels, muſt mark on every wheel chriſtian name, ſirname, and place of reſidence, ain of forfeiture, and a ſum not exceeding 20s. 1 10s. for each [q]. Name of the maker.

aker of wheels and reels may exerciſe his trade :ity, town, corporation, burgh, or place in Scot- ut being hindered by any perſon whatever, and ig chargeable or charged with any entry-money ity whatever, for or in reſpect of following his Freedom of trade.

linen and hempen yarn, ſold or expoſed to ſale orted from one part of Scotland to another, muſt into cuts and heſps or hanks, each heſp or hank 12 cuts, and no more, and each cut containing , all exactly numbered, and no more, and that in every heſp or hank be lint-yarn only, or tow- nd of the ſame edge and fineneſs, and that no tow- it-yarn be mixed together in one and the ſame k, and that the ſame be tied with packthread, n; that the yarn be well reeled, and each cut r hank ſeparated as reeled, and not afterwards. § 6. YARN, AND WORKMEN THEREIN.

, c. 31, § 23.
ſect. 5, 6.
[p] 24 Geo. II, c. 31, § 15.
[q] Ibid. § 15.
[r] ſect. 23.

§ 6. YARN, AND WORKMEN THEREIN.

Yarn not made up as directed is to be forfeited. Officers appointed by the truſtees, or by a juſtice of peace, or magiſtrate, may ſearch for, ſeize, and bring to trial, all illegal yarn. To be tried in the ſame manner, and under the ſame penalties as cloth, being forfeiture of the yarn, and a ſum not exceeding 5l. for every offence [s].

Search.

ALL dyed yarn wrought into chequered linen or handkerchiefs, tickings, or Bengals, muſt be of a ſufficient dye that will hold in waſhing [t].

Pigeons' dung.

ALL linen yarn, bleached or whitened with lime, pigeons dung, or ſoap dregs, is to be forfeited [u].

Falſe reeling.

ANY perſon reeling falſe or ſhort yarn, being convicted by the oath of the owner, or any one credible witneſs, or voluntary confeſſion, muſt be impriſoned, kept at hard labour, and publicly whipped, &c. [x]

EVERY perſon convicted of falſe reeling, making up, expoſing to ſale, ſelling or buying yarn of the produce of Scotland, knowing the ſame to be reeled or made up contrary to the directions of the act 13 Geo. I, forfeits, beſides the yarn, a ſum not exceeding 10s. nor leſs than 2s. for every ſpyndle [y].

IF yarn, ſeized as unſtatutable, ſhall be alleged to be foreign, the owner muſt prove that the ſame was fairly imported from the place where manufactured, or the next adjacent port, and that the duties were paid; and if he fail in ſuch proof, the yarn ſhall be deemed Scots, and forfeited [z].

VII. EVERY maker of heckles, wheels, reels, weaving looms, and weaving reeds, muſt thereon mark his chriſtian

[s] 13 Geo. I, c. 25, § 5, 7, 24.
[t] Ibid. § 11.
[u] Ibid. § 14.
[x] 22 Geo. II, c. 27, § 1.
[y] Ibid. § 13, 14.
[z] Ibid. § 20.

ıme, firname, and place of reſidence, and alſo upon the ed, the hundreds thereof, under the pain of forfeiting the ɔms and reeds, and a ſum not exceeding 20s. nor leſs an 10s. for each [a]. Every maker of theſe articles may ercife his trade within any city, town, corporation, burgh, place in Scotland, without being hindered by any perſon, d without being chargeable or charged, with any entry- ɔney or other duty, for or in reſpect of his following his id trade [b]. § 7. LOOMS AND REELS.

VIII. No weaver is to ſet up as maſter, until he give :urity before a juſtice of peace, or magiſtrate within any rgh, to weave according to law, under the penalty of for- ting every web or piece of cloth by him wrought, or the lue thereof, and 5l. Weavers are to make all the warp of ery piece of linen cloth of equal fineneſs, and the woof all one fineneſs, and proportionable to the warp, and every ece of linen cloth to be of equal fineneſs and thickneſs roughout the whole piece, under the pain of the weaver's feiting his ſecurity, and being diſabled to carry on his ide. Alſo they are to run coarſe coloured threads at the d of every piece, for denoting the hundreds and ſcores of eads in the breadth of the piece, under the pain of for- ting a ſum not exceeding 5l. nor leſs than 20s. and to feit the like penalty, if he mark the cloth ſo as to make appear to contain more threads in the breadth than it lly does [c]. § 8. WEAVERS. Muſt find ſecurity to weave according to law.

WEAVERS are to weave yarn into cloth as agreed, and t to waſte, embezzle, or damnify yarn, under the pain of iking good the parties damages, and paying a ſum not ex- ding 40s. nor leſs than 5s. for every offence [d].

EVERY weaver or manufacturer may weave or ſix his

[a] 24 Geo. II, c. 31, § 15, 23. 13 Geo. I, c. 25, § 8, 9, 13.
[b] § 23.
[d] § 10.

§ 8. WEAVERS. name or other mark upon linen of his own manufacture; and any perſon counterfeiting ſuch mark, is to forfeit 100l. for the uſe of the perſon whoſe mark ſhall be counterfeited [d].

WEAVERS putting yarn of different ſorts, qualities, and fineneſs, in the ſame piece, otherways than as directed by the act, forfeit a ſum not exceeding 40s. nor leſs than 10s. Yarns of different ſorts, qualities, and fineneſs, may be uſed for ſtripped, chequered, or flowered linens, each ſort of yarn being of equal quality and fineneſs throughout each piece, under the penalty of 40s. upon the weaver [e].

EVERY weaver or manufacturer of linen, flaxen, or hempen cloth, may exerciſe his trade within any city, town, corporation, burgh, or place in Scotland, without being hindered by any perſon whatever, and without being chargeable or charged with any entry-money, or other duty whatever, for or in reſpect of his following his ſaid trade [f].

§ 9. LINEN CLOTH. IX. ALL dyed yarn wrought into chequered linen, handkerchiefs, tickings, or Bengals, is to be of a ſufficient dye that will hold in waſhing. Linen cloth bleached with lime, pigeons dung, or ſoap dregs, is to be forfeited [g].

ALL dealers in linen cloth, before ſelling, or expoſing the ſame to ſale, are directed to carry the ſame to the ſtamp-maſter to be inſpected, marked, lapped up, and ſtamped. None is to be lapped up when wet or damp, nor with chalk, duſt, or flour, under the pain of forfeiture of the cloth [h].

No linen cloth is to be ſold, expoſed to ſale, packed up for ſale, or in order to be ſent or carried by land or water, or entered for exportation by ſea, till firſt ſtamped, under

[d] 13 Geo. I, c. 25, § 30.
[e] 24 Geo. II, c. 31, § 11, 12.
[f] Ibid. § 23.
[g] 13 Geo. I, c. 25, § 11, 14.
[h] Ibid. § 20, 26.

he penalty of 5l. for each piece on the ſeller, &c. and as much on the buyer. Perſons authorized by the truſtees, or by juſtice of peace or magiſtrate, may ſearch for, ſeize, and bring to trial, all unſtamped cloth. Such unſtamped cloth to be forfeited, and the poſſeſſor or owner of the warehouſe, cellar, ſhop, or other place where found, fined in 5l[a]. § 9. LINEN CLOTH.

UNMERCHANTABLE or inſufficient cloth brought to be ſtamped, is to be forfeited to the ſtampmaſter, and cut into pieces, not exceeding ſix yards in length[b]. But if damnified through unavoidable accidents in the weaving or bleaching, is to be cut by the ſtampmaſter into ſuch pieces as are ſufficient, and theſe ſtamped, and the inſufficient cuttings returned to the owner; but if the cloth ſhall be damnified or rendered inſufficient through the negligence or ignorance of the weaver or bleacher, it is to be forfeited[c]. Inſufficient cloth.

THE warp yarn of plain linen cloth is to be of the ſame quality and fineneſs throughout ſuch warp, and the woof yarn to be alſo of the ſame quality and fineneſs throughout each woof, under a penalty not exceeding 40s. nor leſs than 5s. upon the weaver. Each ſort of yarn uſed for ſtriped, chequered, and flowered linens, is to be of equal quality and fineneſs throughout each piece, under the penalty of 5s. upon the weaver[d]. Warp yarn. Woof.

WHEN unſtamped cloth ſeized is alleged to be foreign, the owner muſt prove that the ſame was fairly imported from the place of its manufacture, or next adjacent port, and that the duties were paid; and, if he fail in ſuch proof, the cloth to be forfeited[e]. Proof that it is not foreign.

ALL linen cloth of the manufacture of Ireland, imported

[a] 13 Geo I, c. 25, § 21, 22, 23, 24.
[b] Ibid. § 27, 28.
[c] 24 Geo. II, c. 31, § 19.
[d] Ibid. § 11, 12.
[e] § 20.

§ 9. LINEN CLOTH.

into, or expoſed to ſale in Scotland, without the Iriſh ſtamps, is to be forfeited, and ſeized, and tried as Scots[f].

Bleaching.

THE bleaching of linen cloth is the ſubject of various regulations[g].

Stamps.

ANY perſon affixing, or cauſing to be affixed, ſtamps in imitation of Scots, upon foreign linens, forfeits 5l. for every piece[h]. Any perſon affixing, or cauſing to be affixed, on foreign linens, any ſtamps, required by law to be put on Britiſh linens, or ſtamps in imitation thereof, is to be pilloried, and forfeit 50l. or impriſonment for twelve months[i]. Any perſon ſelling, expoſing, or packing up for ſale, foreign linens, knowing them to be thus falſely ſtamped, forfeits 5l. for every piece[k]. And forfeits alſo the linens[l].

Proof of importation.

WHEN cloth ſeized for wanting ſtamps is alleged to be foreign, the owner to prove that the ſame was fairly imported from the place of its manufacture, or the next adjacent port, and that the duties were paid; and, if he fail in ſuch proof, the cloth to be forfeited[m].

ALL Iriſh cloth imported into, or expoſed to ſale in Scotland, wanting the Iriſh ſtamps, are to be forfeited, and ſeized and tried as Scots[n].

THE duty on foreign raw linens imported was taken off for fifteen years[o]. But ſuch linen yarns muſt be entered at the cuſtomhouſe, landed in preſence of the cuſtomhouſe officers, and the importation made in Britiſh, Iriſh, or American veſ-

[f] 24 Geo. II, c. 31, § 20.
[g] 13 Geo. I, c. 25, § 14, 15, 16, 17; 18 Geo. II, c. 24, § 1, 2, 3; 24 Geo. II, c. 31, § 16, 17.
[h] 17 Geo. II, c. 30, § 1.
[i] 18 Geo. II, c. 24, § 4.
[k] 17 Geo. II, c. 30, § 1.
[l] 18 Geo. II, c. 24, § 4.
[m] 24 Geo. II, § 20.
[n] Ibid.
[o] 29 Geo. II, c. 15, § 13.

n failure of which, they are liable in duties [p]. This granted a bounty on the importation of Britiſh and lens, and was continued by various ſtatutes [x]. § 9. LINEN CLOTH.

DS in private cuſtody are to be depoſited, by a certain the king's warehouſes, and the bonds thereupon to vered up; the drawback on exportation paid; and ds not to be delivered out again but for exportation. expoſed to ſale, or found in private poſſeſſion after l day, may be ſeized, and the offender to forfeit 200l. Goods ſeized under this act, are to be carried to the ſtomhouſe after condemnation, to be exported [q]. Goods in private cuſtody.

cambrics and lawns, commonly called French lawns, imported, may be worn or ſold; and no perſon ſhall e to be proſecuted for having them in his poſſeſſion [r]. Cambrics.

THE ſame honourable board of truſtees may direct amps to be uſed and affixed on cloth, as they think The penalty for counterfeiting ſtamps is the ſame orgery [s]. § 10. STAMPING.

RY maker and cutter of ſtamps or ſeals of any kind, nping of cloth, is directed to mark, upon ſome proper every ſtamp, his name and place of abode; to make reſſion of the ſtamp in a book, with the name and tion of the perſon that employed him, and when and m the ſtamp was delivered, under the penalty of 50l. ry offence [t] Maker's name.

: truſtees may appoint proper perſons to view, exa- lap up, mark, and ſtamp all linen cloth for ſale [u].

Geo. II, c. 15, § 14.
Geo. III, c. 28; 39 and 40 , c. 45, § 15; and 41 Geo. , § 5.
Geo. II, c. 32, § 5, 7.
[r] 43 Geo. III, c. 68, § 31.
[s] 13 Geo. I, c. 25, § 19, 25; 24 Geo. II, c. 31, § 22.
[t] ſect. 21.
[u] 13 Geo. I, c. 25, § 19.

§ 10. STAMPING.

ALL dealers in linen cloth, before ſelling or expoſing to ſale, are directed to carry it to a ſtampmaſter, to be inſpected, lapped up, and ſtamped. No ſort of manufacture made of linen yarn is to be ſold, or expoſed to ſale, packed up for ſale, or in order to be ſent or carried by land or water, or entered for exportation by ſea, till firſt ſtamped, under the penalty of 5l. for each piece on the ſeller, &c. and as much on the buyer [x].

Penalty for not ſtamping.

Within 24 hours.

STAMPMASTERS, if the cloth be according to law, are directed to ſtamp the ſame within 24 hours at fartheſt. They are to mark the length and breadth upon each end of every piece; and take of fees for ſtamping each 40 yards, not exceeding 10d. per yard in value, one penny, and for each 40 yards of a higher value, two pence, and proportionally for a greater or leſſer quantity. Stampmaſters not ſtamping according to the directions of the act, muſt make good the parties damages, who bought the cloth on the credit of the ſtamp, to forfeit 5l. for every piece, to be diſmiſſed from his office, and rendered incapable of ſerving for the future. Duty of ſtampmaſters [y].

Stampmaſter's reſponſibility.

May detain the cloth.

STAMPMASTERS may detain cloth not merchantable, till the ſufficiency is tried; if inſufficient, it is to be forfeited to the ſtampmaſter, and cut into pieces not exceeding ſix yards in length [z]. But if it be damnified, through unavoidable accidents in the weaving or bleaching, the ſtampmaſter may cut the ſame into ſuch pieces as are ſufficient, and ſtamp ſuch ſufficient cuttings, returning the inſufficient cuttings to the owner. But if the damage be owing to the negligence or ignorance of the weaver or bleacher, the cloth to be tried and forfeited as directed by 13 Geo. I [a].

Unavoidable damage.

[x] 13 Geo. I, c. 25, § 19, 21, 22.
[y] Ibid, § 12, 20, 21, 27.
[z] Ibid. § 27, 28.
[a] 24 Geo. II, c. 31, §19.

§ 10. STAMPING.

STAMPMASTERS, and any perſon authorized by the board of truſtees, and alſo any perſon authorized to that effect by any juſtice of peace or magiſtrate, may ſearch all warehouſes, ſhops, cellars, and other places, and open any pack or packs of unſtamped cloth, and may ſeize, bring to trial, and get forfeited, what they ſhall find not ſtamped, and the owners or poſſeſſors of the houſes, &c. fined in 5l [b]. Searching.

STAMPMASTERS, before entering upon office, muſt take an oath of fidelity. Likewiſe they muſt adminiſter an oath to the owner or maker of the linen brought to be ſtamped, that the ſame is of the manufacture of Scotland [c]. Oaths.

WHEN unſtamped cloth ſeized is alleged to be foreign, the owner muſt prove that the ſame was fairly imported from the place of its manufacture, or next adjacent port, and that the duties were paid; and if he fail in ſuch proof, the cloth to be forfeited. And all linen cloth of the manufacture of Ireland, imported into, or expoſed to ſale in Scotland, without the Iriſh ſtamps, is to be forfeited, and ſeized and tried as Scots. [d] Proof.

STAMPMASTERS may enter warehouſes, and ſearch for, and ſeize bad, ſhort, damnified, mixed, or ill cleaned lintſeed and hempſeed, and detain it till tried [e]. Searching for lintſeed.

CAMBRICS fabricated in Great Britain muſt be ſtamped at each end. The commiſſioners of exciſe, upon requeſt made to them by the maker or proprietor of cambrics, may order ſtamps to be made, or direct and appoint officers to ſtamp the pieces, for which they are to be paid as the commiſſioners ſhall direct. Notice to be given on purpoſe to the officers, and the goods to be ſtamped before they are cut out of Cambrics, how ſtamped.

[b] 13 Geo. I, c. 25, § 24.
[c] 18 Geo. II, c. 24, § 1.
[d] 24 Geo. II, c. 31, § 20.
[e] Ibid. § 6.

§ 10. STAMPING. the loom, on penalty of 5l. and forfeiture of the goods. The officer is to make entry of the number ſet to each piece, and the number of yards it contains, and the number of threads in the warp, on forfeiture of 51[f].

Fraudulent ſtamping. OFFICERS fraudulently ſtamping, or who permit the fraudulent ſtamping, of any goods not fabricated in Great Britain, or goods of Britiſh fabric, after being taken out of the loom, forfeit 50l. per piece, and are incapacitated. Their aiders or abettors forfeit 100l. and ſtand in the pillory. Perſons attempting, by bribery, or otherwiſe, to corrupt officers to affix their ſtamps falſely to any piece, forfeit 50l[g].

Report to the commiſſioners of exciſe. EVERY officer is to tranſmit to the commiſſioners of exciſe an account yearly of the number of pieces ſtamped by him, and a copy of his entries, diſtinguiſhing the manufactures, on penalty of diſmiſſion[h].

THE ſtamps are to be delivered on demand, or order of the commiſſioners, on forfeiture of 200l[i].

GOODS not legally ſtamped, are liable to forfeiture, and may be ſeized and depoſited in the king's warehouſes, and, after condemnation, publicly ſold[k]. Perſons expoſing to ſale unſtamped goods, forfeit 200l[l].

Counterfeiting ſtamps. THE penalty of forging or counterfeiting any ſtamp, or expoſing to ſale any goods with a counterfeit ſtamp thereon, is felony. The commiſſioners of exciſe may order all ſuch goods made or to be made in Britain or Ireland before the commencement of the act, to be ſtamped, though taken out of the loom, and the ſame may be lawfully ſold[m].

[f] 7 Geo. III, c. 47, § 10, 11, 12, 13.
[g] Ibid. § 14, 15.
[h] Ibid. § 16.
[i] Ibid.
[k] Ibid. § 17.
[l] Ibid.
[m] Ibid. § 18, 19.

THE penalty for counterfeiting ſtamps is the ſame as for gery [n]. § 10. STAMPING.

ANY perſon affixing, or cauſing to be affixed, ſtamps, in itation of Scots or Iriſh ſtamps, upon foreign linens, for- ts 5l. for every piece. And any perſon ſelling, expoſing, packing up for ſale, foreign linens, knowing them to be is falſely ſtamped, forfeits the like penalty [o].

ANY perſon affixing counterfeit ſtamps on linen of the nufacture of Great Britain or Ireland, forfeits 5l. for ry piece; and any perſon knowingly ſelling, expoſing, or cking up for ſale any linens thus ſtamped, forfeits the like nalty [p]. 5l. penalty.

ANY perſon making or affixing, or procuring to be made affixed, on foreign linens, any of the marks or ſtamps re- ired by law to be put on linens of the manufacture of eat Britain or Ireland, or any marks or ſtamps in imita- n thereof, ſhall be pilloried, and forfeit 50l. or be impriſon- for twelve months. And any perſon knowingly ſelling, expoſing or packing up for ſale, or entering for exporta- n, any foreign linens ſtamped with Britiſh ſtamps, forfeits : linens, and 5l. for each piece thereof [q]. Pillory, and 50l. ſterling.

XI. THE ſaid board of truſtees may appoint fit perſons lap up and ſtamp cloth for ſale, to whom all dealers ſhall ng cloth to be lapped up and ſtamped before ſelling, or oſing the ſame to ſale. No cloth is to be lapped up for : when wet or damp, nor with chalk, duſt, or flour, un- the pain of forfeiture [r]. § 11. LAPPING.

[n] 13 Geo. I, c. 25, § 25; 24 Geo. : 31, § 22. 17 Geo. II, c. 30, § 1.

[o] Ibid.

[p] Ibid.

[q] 18 Geo. II, c. 24, § 4.

[r] 13 Geo. I, c. 25, § 19, 20, 26.

§ 11. LAPPING.

Security.

EVERY perſon keeping any public lapping preſs, or lapping houſe, muſt find ſecurity to the ſaid board of truſtees for the faithful performance of his trade, and making good ſuch damages as may ariſe through neglect, or want of ſkill, upon which he ſhall get licence from the truſtees; and any perſon following the trade without ſuch licence, forfeits 5ol. for every year he follows it without ſuch licence [s].

Lapping cloth wet.

EVERY perſon lapping up cloth for ſale when wet, or with chalk, duſt, flour, or other material which may be prejudicial to the cloth, or not duly ſtamped, to forfeit a ſum not exceeding 40s. nor leſs than 10s. for every piece [t].

§ 12. OFFICERS.

XII. ANY perſon or perſons obſtructing any officer appointed by the board of truſtees, in the due execution of his duty, forfeits a ſum not exceeding 5ol. nor leſs than 5l. for every offence [u].

OFFICERS demanding any reward or gratuity, for examining, viewing, or ſigning certificates, to entitle to bounties under this act, forfeit their office, and 100l. ſterling [x].

§ 13. TRIAL.

XIII. OFFENCES againſt acts 13 Geo. I, and 24 Geo. II, are to be determined by one or more juſtice or juſtices of the peace, or magiſtrate or magiſtrates of any borough, ſubject to an immediate appeal to the quarter ſeſſions, whoſe deciſion to be final. If the ſentence be affirmed, the appellant pays full coſts, and double the penalty in the original ſentence. Sentences cannot be ſtopped by any fiſt, ſuſpenſion, or other proceſs. If ſufficient diſtreſs cannot be found, the offender is to be committed to the houſe of correction, or next tolbooth, for any ſpace not exceeding one year [y].—

[s] 24 Geo. II, c. 31, § 16.
[t] Ibid. § 18.
[u] Ibid. § 24.
[x] 19 Geo. III, c. 37, § 10.
[y] 13 Geo. I, c. 25, § 31, 32; and 24 Geo. II, c. 31, § 25.

Offences againſt both theſe acts may be alſo determined by any ſheriff or ſteward depute, or their ſubſtitutes, ſubject to an appeal to the circuit courts [a]. § 13. TRIAL.

JUDGES neglecting or refuſing to execute the powers given by acts 13 Geo. I, and 24 Geo. II, or not putting theſe acts in execution, in the moſt beneficial manner for promoting the linen and hempen manufactures, may, with the approbation of the board of truſtees, be proſecuted before the lords of juſticiary at Edinburgh, or in the circuit courts, and fined in any ſum not exceeding 100l. [b] —JUDGES.

ALL offences againſt act 17 Geo. II, touching ſtamps, are to be determined by one or more juſtice or juſtices of the peace. And the offender convicted upon the oath of one or more credible witneſs or witneſſes [c]. One juſtice. One witneſs.

OFFENCES againſt act 18 Geo. II, for preventing the exportation of foreign linens, in place of Britiſh or Iriſh, are to be tried before the courts of ſeſſion, juſticiary, or exchequer [d].

ALL offences againſt act 22 Geo. II, for regulating perſons employed in the manufactures, are to be determined by one or more juſtice or juſtices of the peace, ſubject in certain caſes, and on certain conditions, to an appeal to the quarter ſeſſions. And the offender may be convicted, upon the oath of the owner, or of one or more credible witneſs or witneſſes, or the voluntary confeſſion of the offender [e].

ALL actions for offences againſt acts 13 Geo. I, and 24 Geo. II, are to be commenced within twelve months after committing the offence; and the action is to ceaſe and be —ACTIONS.

[a] 24 Geo. II, c. 31, § 25.
[b] 13 Geo. I, c. 25, § 33; and 24 Geo. II, § 28.
[c] 17 Geo. II, c. 30, § 2.
[d] 18 Geo. II, c. 24, § 3, 4.
[e] 22 Geo. II, c. 21, § 1, &c.

13 Geo. I, and 24 Geo. II, belong to the infor
ſecutor [f]. Penalties for tranſgreſſing the act 18
preventing the exportation of foreign linens in pl
iſh, belong one moiety to the king, and the other
ſecutor [h]. Penalties for tranſgreſſing the ſtatute
c. 27, belong partly to the proſecutor, and pa
poor [i].

[f] 24 Geo. II, c. 31, § 27.

[g] 13 Geo. I, c. 25, § 18, 19; and 24 Geo. II, c. 31, § 26.

[h] 18 Geo. II, c. 24,

[i] 22 Geo. II, c. 27, Vol. II, p. 187.

CHAP. X.

Of the Jurisdiction of the Justices in relation to the Woollen Manufacture.

§ 1. IN ENGLAND.

THE woollen is the ſtaple manufacture of England. It is the ſubject of a multiplicity of ſtatutes, which Dr. Burn ſtates at great length. There are regulations concerning the winding of wool [a]; for preventing the exportation of the ſheep and wool [b]; concerning cards for manufacturing wool [c]; the deceitful working of woollen cloth [d]; the fulling of cloth [e]; the ſeaching of cloth, and its length, breadth, and weight [f]; the dyeing of cloth [g]; ſtenters and ſtretchers of

[a] 8 Hen. VI, c. 22; 23 Hen. VIII, c. 16; 28 Geo. III, c. 38, § 79, 86.

[b] 9 and 10 Will. III, c. 40; 17 Geo. III, c. 43, § 10; 28 Geo. III, c. 38.

[c] 13 and 14 Cha. II, c. 19; 14 Geo. III, c. 71; 21 Geo. III, c. 37; 26 Geo. III, c. 76.

[d] 43 El. c. 10; 21 James, c. 18; Geo. I, c. 23; 17 Geo. II, c. 5.

[e] 4 Ed. IV, c. 1; 7 Ed. IV, c. 34 28 Geo. III, c. 58.

[f] 3 and 4 Ed. VI, c. 2; 39 Eliz. c. 20; 43 Eliz. c. 10; 3 James, c. 16, and 17; 4 James c. 2; 7 James c. 16; 21 James c. 18; 4 and 5 P. and M. c. 5.

[g] 6 Anne, c. 8; 5 and 6 Ed. VI, c. 6; 3 and 4 Ed. VI, c. 21 23 Geo. III, c. 15.

plicable to this country, are fewer in number, not to be treated of ſo much in detail.

[h] 43 Eliz. c. 10; 22 Cha. II, c. 5; 15 Geo. II, c. 27.

[i] 3 Hen. VII, c. 11; 3 and 4 Ed. VI, c. 25 4 James, c. 2; 5 and 6 Ed. VI, c. 6; 21 James, c. 28.

[k] 10 Anne, c. 16; 1 Geo. ſtat. 2, c. 15; 13 Geo. c. 23.

[l] 30 Cha. II, c. 3.

[m] 11 Ed. III, c. 3; 4 Ed. IV, c. 1; and 11 and 12 Will. c. 20.

[n] By 35 Geo. III, c. 124, every perſon who ſhall have ſerved an apprenticeſhip to the trade of a woolcomber, or is by law entitled to exerciſe the ſame, and alſo his wife and children, may ſet up and exerciſe ſuch trade, or any other trade or buſineſs, which they are apt and able for, in any town or place, without moleſtation by reaſon of uſing ſuch trade; and ſhall not, during the time they exerciſe ſuch trade, be removable to their place of ſettlement, until they become actually chargeable. And if any ſuch woolcomber, or his wife or child, ſhall be proſecuted for exerciſing any ſuch trades, on their making it appear that they have ſerved a be

of any perſon who
apprenticeſhip, ſhall,
ral iſſue pleaded, be f
and ſhall have double

And two juſtices,
woolcomber or his
ſhall exerciſe ſuch t
mon every ſuch perſ
and examine them, o
ing the place of their
ment, who ſhall obey
and make oath accord
juſtices ſhall give an
ſuch affidavit, ſo ma
to the perſon makin
order that he may p
required, which atte
be admitted as evide
ſettlement, before th
ſeſſions: and if ſuch
his wife or child, ſhal
moned to make oat
then, on producing
copy, ſhall not be obli
other or further oath,
a copy of ſuch atteſte
quired. 52.

§ 2. IN SCOTLAND.

THE ſtatute 1661, c. 42, beſtows the ſame privileges upon thoſe who enter into ſocieties for making woollen cloth, upon thoſe who enter into ſuch ſocieties for the making of linen. The firſt ſtatute after the Union, is the ſtatute 1 Geo. I, c. 13, which ordains the dimenſions of every piece of plading, and narrow and broad ſingrums made in Scotland; and which, likewiſe, ordains all ſtockings made in Scotland to be wrought of three threads, and of one ſort of wool and worſted, of equal work and fineneſs, free of left loops, hanging hairs, and burnt, cut, or mended holes, and of ſuch ſhapes and ſizes as the patterns which ſhall be marked by the ſeveral deans of guild of the chief boroughs of the reſpective counties, and according to the dimenſions which are enumerated at large in the act. Theſe patterns are to be kept in the cuſtody of the ſeveral ſtampmaſters.

Dimenſions of woollen cloth.

THE magiſtrates of the chief royal boroughs of every ſhire or ſtewartry are to cauſe ſtamps to be made, bearing the arms of the reſpective boroughs, and are to appoint perſons for inſpecting and ſtamping all ſerges, pladings, ſingrums, and ſtockings; which perſons are to take an oath *de fideli*, and find ſecurity to the ſatisfaction of the magiſtrates. The juſtices of peace, at the quarterly ſeſſions, and, in default of them, the commiſſioners of ſupply, at their annual meetings, are to appoint ſtamps to be kept at places where ſuch ſerges, &c. are ſold. No ſtampmaſter is to trade in the articles above mentioned, or to ſtamp any of them which are not made of well ſorted yarn, equally wrought, and having the other requiſites, under pain of forfeiting twenty ſhillings for every piece, and the ſame ſum for every dozen of ſtockings. The ſame penalty is ordained for buying, exporting, or carrying to be exported, any of theſe articles when unſtamped. Perſons affixing ſtamps without authority, or counterfeiting ſtamps, forfeit five pounds, and, if inſolvent, are to be impriſoned

Stamps for woollen cloth.

§ 2. IN SCOTLAND. six months. The deans of guild are made the sole judges in this matter within their boroughs; and they, with the heritors or proprietors of public fairs or markets, are joint judges of offences against this act in such places, where goods are there exposed to sale; failing whom, either of the judges aforesaid.

§ 3. PENALTIES. III. THE penalties are to be inflicted within sixty days after the offences are discovered. If the forfeitures are not to be paid within ten days after conviction, warrant shall be issued to levy them by distress; and, failing distress, the offenders are to be committed to the house of correction or the county jail, for a space not exceeding three months for one offence. An appeal lies to the next quarter-sessions, notice thereof being given; and the justices are to award costs to the party grieved. The statute 10 Geo. I, c. 2. regulates the length and breadth of serges, appoints magistrates of royal boroughs the sole judges, within their respective jurisdictions, of the several penalties, and makes several regulations besides, much the same with those already mentioned. The act 13 Geo. I, c. 23, regulates the length of warping-bars; orders makers of cloth, or goods mixed with wool, to give out all wool, yarn, and other materials, and to receive them back, by weight of 16 ounces per pound, under penalty of five pounds for every offence; imposes the same penalty upon clothiers, &c. who use any ends of yarn, weft, or other refuse of cloths, flocks and pinions only excepted, in working up goods; ordains offences against the act to be prosecuted before two justices, upon information on oath within three months, who are, upon conviction, to levy the penalties in manner already mentioned; gives power to one justice to grant warrant for searching the houses &c. of suspected persons; and grants to the party who thinks himself aggrieved an appeal to the quarter-sessions, as above, whose decision it makes final. The act 15 and 16 Geo. II, c. 2.

Howlevied.

Appeal.

§ 3. PENALTIES.

order to prevent any cloth, or woollen goods, remaining the rack or tenters, or any woollen yarn, or wool, left to dry, from being ſtolen or taken away in the night- ne, authorizes any juſtice of peace, upon complaint by the mer within ten days, to ſearch, in the day-time, any uſes or places where the claimant ſwears he ſuſpects ſuch ods to be. If the goods be found, and the perſon ſuſpect- cannot give a ſatisfactory account of them, or ſhall not duce, within convenient time, the perſon from whom he them, or produce ſome credible perſon to depoſe to his perty in ſuch goods, then he ſhall be deemed convicted, d ſhall pay the owner treble value, or be committed to jail. ſuch perſon commit a ſecond offence, he ſhall be commit- by the juſtice before whom he was formerly convicted, d be detained till the next aſſizes, or great ſeſſion, when, the jury find him guilty, he is to be tranſported for ſeven ars. Perſons not twice convicted may appeal to the quar- ſeſſions.

Cloth or woollen goods ſtolen from the rack or tenters.

Appeal to the quarter ſeſſions.

CHAP. XI.

Of the Juriſdiction of the Juſtices in relation to the Leathern Manufacture.

§ 1. IN GENERAL.

I. THE ſtatute of James I, c. 22, was intended to contain all the regulations concerning leather; and by ſtatute 24 Geo. III, ſeſſ. 2, c. 19, § 2, it is enacted, that ſo much of 1 James, c. 22, as is recited in 9 Anne, c. 11, extends to every part of the united kingdom; and no perſon exerciſing the trade of tanning leather by himſelf, or by any other perſon, ſhall, during the time that he ſhall ſo uſe the ſaid trade of a tanner, exerciſe or uſe the craft of a ſhoemaker, currier, butcher, or any other artificer exerciſing the cutting or working of leather, upon pain of forfeiting every ſuch hide ſo by him wrought or tanned, or the value thereof, and alſo 5ol. ſterling; and ſo much of the aforeſaid act of 1 James I, as is re-enacted in 9 Anne, c. 11, ſhall extend to every part of Great Britain, (except ſuch part thereof as has been altered by any law ſince that time made and now in force); and all provoſts, bailies, and all other chief officers of royal boroughs, and bailies of royalties, and other

Not to exerciſe the trade of a tanner, ſhoemaker, &c. at once.

ead officers in the ſeveral cities and boroughs in Scotland, and all tanners, curriers, ſhoemakers, and all other perſons concerned in the execution of the ſaid ſtatute, ſhall, under ich penalties as are therein expreſſed, duly execute and mply with the ſame, in relation to the tanning, making, effing, buying or ſelling, or other matters concerning lea-er, (other than ſuch as have been altered by any law ſince at time and now in force), as effectually and with the me powers as if the ſaid magiſtrates had been particularly ſcribed in the ſaid act 1 James I. § 1. IN GENERAL.

THIS act, therefore, of James I. is obligatory in Scotland.

II. ALL forfeitures, by the act of 1 James I. c. 22, where ſpecial direction is given to the contrary, are divided, one ird to the king, one third to him that ſhall ſue, and one ird to the city, town, or lord of the liberty. § 2. GENERAL PENALTIES AND FORFEITURES.

THERE are various regulations concerning manufacture leather, as to penalties and forfeitures[a]; hides before they me to the tanner[b]; the tanning of hides[c]; the currying hides[d]; the ſelling and regiſtering of leather[e]; of the manufacturing or exporting of leather[f]; which need not here ſtated.

[a] James I, c. 22, § 46; 9 Anne, c. 11, § 11; 1 James I, c. 22, § 8.

[b] James I, c. 22, § 6, 20, 21, 22, 26, 27; and 9 Anne, c. 11, § 12; 13 and 14 Car. II, c. 7, § 8.

[c] James I, c. 22, § 15, 26; and 13 and 14 Cha. II, c. 7, § 13; and 18 Geo. II, c. 25, § 4, 5, 6.

[d] 1 James I, c. 22, § 14, 41; 4 James I, c. 6, § 2; 13 and 14 Cha. II, c. 7, § 4; 22 Geo. II, c. 29; 1 Will. ſeſſ. 1, c. 33.

[e] 1 James I, c. 22, § 28, 29, 44; 1 Will. ſeſſ. 1, c. 35, § 3; 9 Anne, c. 6, § 4.

§ 3. APPOINTMENT OF INSPECTORS.

III. But it may be proper ſhortly to take notice of the act 39 and 40 Geo. III, c. 66, as corrected and explained by ſubſequent enactments, relative to the appointment of inſpectors.

THE mayor, bailiff, or other head officer, of any town having ſuch head officer, or any two or more juſtices of the peace, or magiſtrates, having juriſdiction to keep the peace within any town where there ſhall be no ſuch head officer as aforeſaid, and in towns where there ſhall be no ſuch magiſtrates, then any two juſtices acting for the diviſion of the county where ſuch town ſhall be ſituated, are empowered to appoint places and times for examining raw hides, and by appointing proper perſons to be inſpectors.

THE magiſtrates above-mentioned name the inſpectors on the recommendation of any ſix maſter manufacturers of[a], or workers or dealers in[b] leather, provided three manufacturers of leather[c], concur. If they recommend two perſons where one (or four where two) ſhall be neceſſary, then one or two ſhall be appointed as the caſe may require[d]. Any inſpector may be diſcharged for neglect or miſconduct, and another appointed in his room[e].

Injuring of hides.

Any one juſtice.

One inſpector.

THE injuring of any hide, whether wilfully or careleſsly, ſo as to render it leſs valuable for making leather, or flaying any hide of any ox, cow, bull, heifer, ſteer, ſtirk, or calf, more than two inches[f] below the knee or gambrel, is puniſhable by certain pecuniary penalties, on conviction before any one juſtice of peace, upon the oath of any inſpector[g].

[a] § 3.

[b] 41 Geo. III, c. 53, § 2.

[c] As tanners, ſkinners, or curriers, 41 Geo. III, c. 53, § 3.

[d] § 3.

[e] Ibid.

[f] 43 Geo. III, c. 53, § 5.

[g] § 4. The penalties contained in the former act are reſtricted as follows: The fine ſhall not exceed 5s. for in-

§ 3. APPOINT-MENT OF INSPECTORS.

a proprietors mark the hides, and are entitled to certain fees [g]. If any other perſon than an inſpector mark any hide he is liable in a penalty of 20s. ſterling [l]. Even without the judgment of any magiſtrate, the inſpectors may inflict penalties not exceeding the half of the higheſt reſpectively appointed by the ſtatute. Their ſentence, however, is ſubject to the determination of arbitrators [h]. If either the penalty or fee is not paid, the inſpector may ſeize and ſell the hides, unleſs the party give notice of his intention to have the matter decided by arbitrators [i]. The hides muſt be brought for inſpection within ten days from their being flayed, under penalty, either not bringing the hide to the place appointed for marking, or taking it away before it is marked, the penalty ſhall not exceed 5l. nor be leſs than 2l. Any perſon may carry his hides for inſpection to any other place where there are inſpectors, provided he give notice of his intention to do ſo, and ſhall carry his hides to ſuch other place of inſpection for not leſs than a month [k].

Fees for marking.

Penalty for not bringing the hide to the place.

Places of inſpection, or intimation,

and not leſs than a month.

In caſe of diſputes, the magiſtrate may ſummon any five perſons engaged in the working of leather, any three of whom may determine whether the hides be injured or not. They muſt take an oath to do equal juſtice. They are directed by ſtatute to give their deciſion in twenty-four hours [m]. The expence falls on the party againſt whom the award is given. Witneſſes, though living beyond the magiſtrate's juriſdiction, may be ſummoned as witneſſes; and all who do not attend, are under a penalty of 40s [n].

Diſputes ſettled.

Leather-maker ſummoned.

Deciſion in 24 hours.

Expences.

Fine for non-attendance.

the hide of a bull, cow, ox, ſtirk, ſteer; nor 2s. 6d. for in that of a calf; nor 2s 6d. for that of a horſe, mare, or . It did not alter the penalty former ſtatute in the caſe in- the hide of every hog, pig, ſheep or lamb, which is any ſum not more than 6d. and not under 3d.

[g] § 5. [h] § 6. [i] § 4. [l] § 9. [m] § 6. [n] § 11. [o] § 12. [p] § 10.

§ 3. APPOINTMENT OF INSPECTORS.

THE penalty provided for goes, one half to the informer, and the other half towards carrying on the purpoſes of the ſtatute[q]. The penalties are recoverable before any one juſtice of peace or other magiſtrate, on confeſſion of the party or oath of one credible witneſs. The penalty is levied by warrant under the hand of ſuch magiſtrate by diſtreſs and ſale; and, in default of diſtreſs, (goods), by impriſonment, which ſhall not exceed one month[r]. If the penalty exceed 10s. appeal is competent to the next general or quarter ſeſſions, upon giving ſecurity to the amount of the penalty and coſts. The judgment of the ſeſſions is not removeable by *certiorari* into any other court whatever[s]. The information for the offence of gaſhing raw hides muſt be within three days from the inſpection[t], and, in caſe of other offences, within fourteen days[u]. The conviction muſt be in the following form[x]. This conviction muſt be certified to the next quarter ſeſſions, and filed among the records.

Application of the penalty.

Juriſdiction.

Execution by diſtreſs and ſale.

Appeal.

No *certiorari*.

[q] 43 Geo. III, c. 59, § 7, 14.

[r] § 16.

[s] Whether in Scotland, where our courts know nothing of *certiorari*, this is exclusive of review by advocation, has been already more than once conſidered.

[t] § 18.

[u] § 8.

[x] Be it remembered, that on the day of in the year A. B. was, on the complaint of C. D. convicted before of the juſtices of the peace for ſaid county of (or for the city, &c. as the caſe may happen to be), in purſuance of an act paſſed in the fortieth year of his majeſty king George III, for (as the caſe may be). Given under hand and ſeal, the day and year above written.

CHAP. XII.

Seducing Artificers to leave the Kingdom.

BY the 5 Geo. c. 27, it is enacted, that if any perſon ſhall contract with, entice, or endeavour to perſuade y manufacturer or artificer in wool, iron, ſteel, braſs, or y other metal, clockmaker, watchmaker, or any other arti- er or manufacturer, to go out of this kingdom, into any reign country out of his majeſty's dominions, and ſhall (on ecution in twelve months) be convicted thereof on in- ment or information, in the courts at Weſtminſter, aſ- es, or ſeſſions, of the county where the offence ſhall be mmitted; he ſhall for the firſt offence be fined not ex- eding 100l. and be impriſoned for three months, and until e fine be paid; for the ſecond offence, ſhall be fined at the cretion of the court, and be impriſoned twelve months, d till the fine is paid [a]. § 1. LEAVING THE KING- DOM.

AND if any ſubject, being ſuch artificer or manufacturer, all go into any country out of his majeſty's dominions, to

[a] § 1, 2.

§ 1. LEAVING THE KINGDOM.

exerciſe or teach any the ſaid manufactories, to foreigners, or if any ſubject who ſhall be in any ſuch foreign country, and there exerciſe any the ſaid manufactories, ſhall not return in ſix months next after warning be given him, by the ambaſſador, miniſter, or conſul, or perſon authorized by him, or by a ſecretary of ſtate, and from thenceforth continually inhabit within this realm; he ſhall be incapable of any legacy, or of being executor, or adminiſtrator, and of taking any lands, by deſcent, deviſe, or purchaſe, and forfeit his lands and goods, and be deemed an alien, and out of the king's protection [b].

AND on complaint on oath before a juſtice, that any perſon is endeavouring to ſeduce or draw away any ſuch manufacturer or artificer, or that he hath contracted or is preparing to go out of the kingdom; he may iſſue his warrant to bring ſuch perſon before him or ſome other juſtice; and if it ſhall appear to ſuch juſtice by confeſſion, or the oath of one witneſs, that ſuch perſon was guilty of any the ſaid offences, he may bind him over to the next aſſizes or ſeſſions, to anſwer the premiſes; and if he ſhall upon indictment be there convicted of any ſuch promiſe or contract, or preparation to go abroad beyond the ſeas, he ſhall give ſuch ſecurity, not to depart out of the realm, as ſuch court ſhall think reaſonable, and be impriſoned until ſuch ſecurity be given [c].

AND by the 23 Geo. II, c. 13, if any perſon ſhall contract with, or endeavour to perſuade or ſeduce any artificer in the manufactures of Great Britain, to go into any foreign country, not belonging to the crown of Great Britain; and ſhall be thereof convicted, in twelve months, in the king's bench, or at the aſſizes; he ſhall for every ſuch perſon forfeit 500l. and be impriſoned in the common gaol for twelve months,

[b] § 3. [c] § 4.

nd till payment of the forfeiture; and for a ſecond or other ubſequent offence, ſhall forfeit 1000l. and be impriſoned wo years, and till payment [d]. § 1. LEAVING THE KINGDOM.

II. By the 23 Geo. II, c. 13, if any perſon ſhall put on oard any veſſel not bound directly to ſome of the Britiſh ominions, any tools or utenſils, or part thereof proper for ither the woolen or ſilk manufactures; he ſhall forfeit the ame, and 200l [e]. § 2. EXPORTING TOOLS.

AND any officer of the cuſtoms may ſeize, and ſecure in ome of the king's warehouſes, all ſuch tools and utenſils as hall be found on board any ſuch veſſel; and the ſame, after ondemnation, ſhall be publicly ſold [f].

AND if the maſter or captain ſhall knowingly permit any he ſaid tools or utenſils to be put on board his ſhip; he hall forfeit 100l. and if it is a king's ſhip he ſhall alſo forfeit his office, and be incapable of any office under the rown [g].

AND if any officer of the cuſtoms ſhall take any entry outward, or ſign any ſufferance for ſhipping or exporting any he ſaid tools, or knowingly permit the ſame to be done; he hall forfeit 100l. and his office, and be incapable of any office under the crown [h].

ALL which ſaid penalties on this act ſhall be half to the ing, and half to him that ſhall proſecute [i].

AND by the 14 Geo. III, c. 71, if any perſon ſhall put on board any veſſel not bound directly to ſome port in Great Britain or Ireland, any tools or utenſils, or part thereof, pro-

[d] § 1, 2; 22 Geo. III, c. 60, § 1, 2; 25 Geo. III, c. 67, § 6, 7.
[e] § 3. [f] § 4. [g] § 5. [h] § 6. [i] § 7.

§ 2. EXPORTING TOOLS. per for the cotton or linen manufactures; he ſhall forfeit the ſame, and alſo 100l [k].

AND any officer of the cuſtoms may ſeize and ſecure in ſome of the king's warehouſes, all ſuch tools and utenſils or parts thereof as he ſhall find in any ſuch veſſel; and the ſame, after condemnation, ſhall be publicly ſold: and half the produce thereof ſhall be to the king, and half to the officer who ſhall ſeize the ſame [l].

AND if the captain or maſter ſhall knowingly permit any ſuch tools or utenſils to be put on board his ſhip, he ſhall forfeit 200l. and if it is a king's ſhip, he ſhall alſo forfeit his office, and be incapable of any office under the crown [m].

AND if any officer of the cuſtoms ſhall take any entry outward, or ſign any ſufferance for ſhipping or exporting any the ſaid tools or utenſils, or knowingly permit the ſame; he ſhall forfeit 200l. and his office, and be incapacitated [n].

AND if any perſon ſhall have in his poſſeſſion any ſuch tools or implements proper for the cotton or linen manufactures, or any tools or implements uſed in the woollen or ſilk manufactures (except ſtock cards not exceeding 4s. a pair, and ſpinners cards not exceeding 1s. 6d. a pair, intended to be exported to North America, 15 Geo. III, c. 51) and oath ſhall be made before one juſtice that there is reaſon to believe ſuch perſon hath in his poſſeſſion ſuch tools or implements, or part thereof, with intent to export the ſame to ſome other part or place than Great Britain or Ireland; ſuch juſtice ſhall iſſue his warrant to ſeize all ſuch tools or implements and parts thereof, and alſo to bring the perſon complained of before him or ſome other juſtice: And if he ſhall not give a ſatisfactory account to ſuch juſtice, of the uſe or

[k] § 1. [l] § 2. [m] § 3. [n] § 4.

purpoſe to which ſuch tools or utenſils are intended to be appropriated, the ſaid juſtice ſhall cauſe the ſame to be detained, and bind the perſon ſo charged with reaſonable ſureties, to appear at the next aſſizes or ſeſſions; and if he ſhall not give ſuch ſecurity, the juſtice ſhall commit him to gaol till the next aſſizes or ſeſſions, and until he ſhall be delivered by due courſe of law. And if he ſhall be there convicted, he ſhall forfeit 200l [o]. § 8. REPORTING TOOLS.

ALL which forfeitures by this act inflicted on offenders ſhall be applied half to the king, and half to him who ſhall ſue [p].

AND by the 21 Geo. III, c. 37, if any perſon ſhall put on board or pack in order to be put on board any veſſel not bound directly to any port in Great Britain or Ireland, or ſhall bring to any wharf or other place in order to be ſo put on board any ſuch veſſel, any machine, engine, tool, preſs, paper, utenſil or implement, or any part, model or plan thereof, proper for the woollen, cotton, linen, or ſilk manufactures; one juſtice, on complaint upon oath by one witneſs, may iſſue his warrant to ſeize the ſame, together with the package and other goods packed therewith (if any ſuch there be), and to bring the perſon complained of before him or ſome other juſtice; and if he ſhall not give to ſuch juſtice a ſatisfactory account of the purpoſe to which the ſame are intended to be appropriated, the juſtice ſhall cauſe the ſame alſo to be detained, and bind the party to appear at the next aſſizes or quarter ſeſſions, and on neglect or refuſal ſo to do, ſhall commit him to the gaol or houſe of correction until the next aſſizes or ſeſſions, and until delivered by due courſe of law. And on conviction at ſuch aſſizes or ſeſſions, upon indictment or information, he ſhall forfeit all the ſaid goods, and alſo 200l. and be impriſoned in the common gaol or

[o] § 5. [p] § 6.

§ 2. EXPORTING TOOLS. houſe of correction for twelve months, and until the forfeiture ſhall be paid [q].

AND the officers of the cuſtoms may ſeize any ſuch goods; and after condemnation in due courſe of law, the ſame ſhall be ſold by order of the commiſſioners to the beſt bidder, and the produce thereof, after charges deducted, ſhall go half to the king, and half to the officer who ſhall ſeize and proſecute [r].

AND if the captain or maſter of any veſſel ſhall knowingly permit any ſuch goods to be put on board; he ſhall forfeit 200l. and if it is a king's ſhip he ſhall alſo forfeit his office, and be incapable to hold any office under the crown [s].

AND if any officer of the cuſtoms ſhall take any entry outward, or ſign any ſufferance for the ſhipping or exporting the ſame, or knowingly permit the ſame to be done; he ſhall forfeit 200l. and his office, and be incapacitated [t].

AND if any perſon hath in his cuſtody, or ſhall apply for, or procure to be made, any ſuch machine or implement as aforeſaid; he ſhall, on the like conviction, forfeit the ſame, and alſo 200l. and be impriſoned for twelve months and until the forfeiture ſhall be paid. Proſecution upon this clauſe to be within twelve months after the offence committed [u].

THE ſaid forfeitures, not herein otherwiſe directed, to go to the informer, after the expences of proſecution paid [x].

PROVIDED, that nothing herein ſhall extend to the preventing woollen cards or ſtock cards, not exceeding in value 4s. a pair, and ſpinners cards, not exceeding 1s. 6d. a pair, from being exported to any of his majeſty's colonies in America [y].

[q] § 1. [r] § 2. [s] § 3. [t] § 4. [u] § 6. [x] § 7. [y] § 9.

FINALLY: By the 22 Geo. III, c. 60, if any perſon ſhall contract with or endeavour to perſuade any artificer concerned in printing callicoes, cottons, muſlins or linens of any ſort, or in preparing any blocks, plates, engines, tools, or utenſils for ſuch manufactory, to go out of the kingdom, and be convicted thereof in the king's bench or at the aſſizes in England, and the court of juſticiary and circuit courts in Scotland, he ſhall forfeit 500l. and be impriſoned for twelve months; for a ſecond offence 1000l. and be impriſoned for two years. § 2. EXPORTING TOOLS.

AND if any perſon ſhall export or attempt to export any blocks, plates, engines, tools, or utenſils, commonly uſed in the callicoe, cotton, muſlin, or linen printing manufactures; he ſhall forfeit the ſame, and alſo 500l. to be recovered in the courts at Weſtminſter in England, and court of ſeſſion in Scotland.

AND any officer of the ſhip conniving thereat ſhall forfeit 200l.; and if it is a king's ſhip, he ſhall alſo be incapacitated. In like manner, by act 25 Geo. III, c. 67, if any perſon ſhall seduce any artificers in iron or ſteel to leave the kingdom, he ſhall incur a penalty of 500l. ſterling, beſides impriſonment for one year, and till payment; and for the ſecond offence, a penalty of 1000l. and impriſonment for two years. The penalties recoverable as under 22 Geo. III, c. 60, only the action muſt be at the ſuit of the lord advocate or any of the officers of the cuſtoms. The penalty is divided between the king and the officer of the cuſtoms ſuing. The offence is triable in England before the court of king's bench, gaol delivery and aſſizes, and quarter ſeſſions, and the court of juſticiary, and circuit courts in Scotland. There may be reaſon to doubt, therefore, whether the Scottiſh quarter ſeſſions are competent; the quarter ſeſſions occurring in the enumeration of the Engliſh courts.

CHAP. XIII.

Of the Juriſdiction of the Juſtices in relation to the Customs.

§ 1. IN GENERAL.

I. CUSTOMS are a duty paid by the merchant at the quay, upon all imported, as well as exported, commodities, by authority of parliament [a]. They are ſo called, according to Dr. Smith, as being cuſtomary payments [b]; but Blackſtone, anxious to derive the king's original right to cuſtoms from act of parliament, conſiders the appellation as a tranſlation of the French word *couſtum* or *coutum*, which ſignifies toll or tribute, and owes its own etymology to the word *couſt*, which ſignifies price, charge, or, as we have adopted it in Engliſh, *coſt* [c].

Definition.

Origin of the name.

Early mode of taxation.

Moſt popular.

IT is certain, at leaſt, that this was a very ancient mode of taxation. It is taken notice of in our earlieſt laws [d]. It was, indeed, a very natural tax, the king being bound, of

[a] Blackſt. B. i, c. 8.
[b] Wealth of Nations, B. v, c. 2.
[c] B. i, c. 8, p. 315.
[d] Stat. Wilhelmi, c. 36 § 3, and David II, c. 49.

mon right, to keep up the ports and the havens, and to § 1.
ect the merchants from pirates: beſides, this tax being IN GENERAL.
idered as an aſſeſſment on the gains of merchants, which
e envied while their perſons were deſpiſed, was the moſt
ular of any. In thoſe days, it was not underſtood that
merchant made the conſumer as certainly repay him a
it on the tax, which he diſburſed, as on the commodity
ch he ſold.

UT it is not neceſſary to trace the hiſtory of the cuſtoms
ither country from their ſmall beginnings to the very
lexed and entangled condition into which they naturally
with the increaſe of our trade and taxation; ſome arti-
, that of French wine in particular, being the ſubject of
leſs than fifteen different duties, which, of courſe, lay
ly diſperſed in ſo many different acts of parliament [e].

UT this important ſubject was reduced from a perfect First conſo-
s into a plain and ſimple form by the 27 Geo. III, c. 13, lidation act.
d the conſolidation act. With regard to the quantum
uty, it repealed all the former ſtatutes impoſing duties
uſtoms and exciſe: Farther it conſolidated all the former
es; which were thenceforward to be paid according to
w book of rates annexed to that ſtatute.

INCE that period, the progreſſive multiplication of duties
ing occaſioned the like confuſion, another conſolidation
ute was paſſed with the like beneficial conſequences [f].

I. BY this ſtatute, it is ordained that the former duties § 2.
uſtoms and drawbacks ſhould ceaſe from the 5th of July 43 GEO. III, c. 97.
3; and that, in lieu thereof, new ones ſhould be levied Former duties to ceaſe.
eable to a ſchedule annexed to the act. Jewels muſt be

[e] Sir John Sinclair's Hiſtory of the Public Revenue.
[f] 43 Geo. III.

§ 2. 44 GEO. III, c. 97. entered and landed as other goods. The act does not repeal or alter provisions of union acts, &c. between Great Britain and Ireland, respecting duties on goods imported or exported.

Fish caught by British ships and crews. Fish, of British taking and curing, caught by the crews of vessels built in Great Britain, Ireland, &c. and navigated and registered according to law, may be imported, duty free. The master must make oath that such fish is British cured. There are certain exceptions from tonnage duty, which are contained in schedules appended to the act, viz. A. table third, and table B. under the title tonnage. The act does not repeal drawbacks to navy officers, nor prevent tobacco for the use of seamen being removed from warehouses, duty free.

Drawback to navy officers.

Duties on goods which might have been housed. THE duties are not payable upon landing goods, which might have been warehoused or bonded by law before 5th of July 1803. Where goods are chargeable, according to the value, it shall be considered (on importation) as at the port of their importation, which shall be ascertained according to 27 Geo. III, c. 13, § 17, 18; and if not truly valued, may be detained [g]. On exportation, the value to be considered as at the port of exportation, &c. as under 27 Geo. III, c. 13, § 19 [h].

IF, on making entry of British goods for exportation, the real value cannot be ascertained, they may be exported on oath of the fact, and bond for payment of the duties, and for producing such documents as may be required by the commissioners of the customs. The bonds are not chargeable with stamps: there is a penalty for making a false declaration thereof. If the goods be detained for not being truly valued, the commissioners, upon proof that no fraud

Entry may be amended, if no fraud was intended.

[g] See § 18, 21, 22, 23, as to East India goods.

[h] See also c. 128 of this session, § 1.

ras intended, may direct the entry to be amended upon rea- § 2. 43 GEO. III, c. 97.
onable terms. The proprietor is not to have damages.

TONNAGE duties do not extend to Br[redacted] ſhips not requir-
d to be regiſtered, nor to ſhips in ballaſt. Tonnage duties
n veſſels to or from foreign ports ſhall be paid each voyage,
nd computed according to their regiſter, or under 26 Geo.
II, c. 60.

THE pains of death, &c. in former revenue acts, extended
) this act. The proviſions of acts in force for aſcertaining the
alue of goods, &c. ſhall continue except as thereby altered.

COMMISSIONERS of cuſtoms may cloſe accounts of collec-
ors or receivers, and correct erroneous application of duties.
ommiſſioners for auditing public accounts may allow ſuch
orrections. The treaſury are directed in future to cauſe an
:count to be kept of what the hereditary revenues of the
own would have produced if not blended with other du-
:s, and laid before parliament with the public accounts di-
cted by 42 Geo. III, c. 70. The hereditary revenue of his
ajeſty in Scotland is not to be altered [k]. The duties ſhall
: carried to the Britiſh conſolidated fund. The whole of
e duties, except otherwiſe provided [l], ſhall be entered in
ie account at the exchequer; and the treaſury ſhall cauſe
ſtinct accounts, of ſuch as were to be kept ſeparate for ten
:ars, from being granted to be ſo kept, and laid before par-
ıment, purſuant to 42 Geo. III, c. 70.

SUCH are the outlines of this ſtatute. To go into any
ımeration of particulars that could be uſeful in practice,
ould lead us beyond tolerable bounds. Such information
ıuſt, therefore, be ſought from the ſtatute itſelf, and ſuch

[k] See 1 Geo. III, c. 1, § 8. [l] See § 54.

§ 2. 43 GEO. III, c. 97. compilations as that of Mr. Huie's of the exciſe. Another reaſon that makes it unadviſeable here to go into ſuch particulars, is the perpetual change of that branch of our law. Every ſeſſion of parliament important alterations take place. Even a full ſtatement here would, therefore, run the riſk of miſleading. Since this conſolidation act has paſſed, it has already undergone various alterations. Theſe matters certainly cannot be obtained but by examining the conſolidation general ſtatute with ſubſequent enactments. It may be ſufficient therefore to confine our attention to the explanation of the general nature of that juriſdiction which the juſtices enjoy in relation to the cuſtoms, and the procedure by which it is explicated.

§ 3. JURISDICTION OF THE JUSTICES. III. THE juriſdiction of the juſtices in regard to the cuſtoms is derived from particular ſtatutes, which therefore govern both the extent thereof, and the manner of explicating it.

Two juſtices. ANY two juſtices are authorized to adminiſter the oath for the faithful execution of their office, which muſt be taken by the commiſſioners and patent officers, and their deputies, clerks or ſervants, and all other officers in the cuſtoms[m].

One juſtice. ANY one juſtice of peace has criminal juriſdiction to puniſh porters and others aſſiſting in the carrying away goods from the ſhore without the preſence of an officer of the cuſtoms[n]; ſuſpicious perſons lurking within five miles of

[m] 6 Will. c. 1, § 5.

[n] 13 and 14 Car. II, c. 11, § 7. And if any carman, porter, waterman, or other perſon, ſhall aſſiſt in the taking up, landing, ſhipping off, or carrying away, any ſuch goods; ſuch perſon being apprehended by the warrant of any juſtice of the peace, and the ſame being proved by the oath of two witneſſes, the ſaid offender for the firſt offence ſhall by the juſtice be committed to the next gaol, there to remain till they find ſurety of the good behaviour for ſo long time until he be diſcharged by the lord treaſurer, chancellor, under treaſurer, or barons of the exchequer; and for the ſecond offence he may by

the coaſt without being able to give any ſatisfactory account of themſelves [o]; perſons buying or receiving [p], or

§ 3. JURISDICTION OF THE JUSTICES.

juſtice of the peace as aforeſaid, charged by [illegible] over and above what he may be [illegible] to on account of the ſaid run goods. § 8.

committed to the next gaol, there remain for two months without bail, or until he ſhall pay to the ſheriff 5l. for the king's uſe, or until he ſhall be diſcharged by the court of exchequer as aforeſaid.

All porters and others, knowingly carrying run or prohibited goods, and who ſhall be convicted thereof (on appearance or default) on the oath of one witneſs, or confeſſion, before one juſtice where the offence ſhall be committed, or the offender found, ſhall forfeit treble value, half to the informer, and half to the poor, to be levied by diſtreſs by warrant of ſuch juſtice, and for want of diſtreſs to be committed to the houſe of correction, to be whipt and kept to hard labour not exceeding three months. 9 Geo. II, c. 35, §21.

By the 8 Geo. c. 18. Perſons paſſing with foreign goods landed without entry, within 20 miles of the coaſt, if they be more than five in number, or armed, or diſguiſed, or who ſhall forcibly reſiſt the officers of the cuſtoms or exciſe in ſeizing run goods, ſhall be guilty of felony, and tranſported for ſeven years. § 6.

But if any offender ſhall, in two months after his offence, and before conviction, diſcover his accomplices, ſo as two or more be convicted; he ſhall have a reward of 40l. if the value of the run goods exceed 50l. and ſhall be acquitted. § 7.

And any other perſon diſcovering any one offender, in three months, ſo as he be convicted, ſhall have in like

[o] On oath made before a juſtice of the peace, that any perſon is lurking within five miles of the ſea coaſt or any navigable river, and there is reaſon to ſuſpect that he waits with intent to be aiding in running goods, the juſtice may grant his warrant to bring him before him; and if he ſhall not give a ſatisfactory account of himſelf and his employment, or otherwiſe make it appear that he is not concerned in any clandeſtine or unlawful buſineſs, he ſhall be committed to the houſe of correction, to be whipt and kept to hard labour not exceeding one month: And the commiſſioners of the cuſtoms or exciſe ſhall cauſe to be paid to the informer a reward of 20s. for each offender. 9 Geo. II, c. 35, § 18.

But if ſuch perſon ſhall deſire time for clearing himſelf, he ſhall not be puniſhed by whipping or other correction, but committed to the common gaol till he ſhall do ſo, or till he find ſecurity not to be guilty of any the ſaid offences. § 19.

[p] If any perſon ſhall knowingly receive or buy any run goods; he ſhall on conviction (after ſummons) by confeſſion, or oath of one witneſs, before one juſtice where the offence ſhall be committed or the offender ſhall be found, forfeit 20l. half to the informer, and half to the poor, by diſtreſs; for want of diſtreſs, to be committed to priſon for three months. 8 Geo. c. 18, § 10.

§ 3. JURISDICTION OF THE JUSTICES.

concealing [a], or offering to ſale ſmuggled goods [b]; perſons with offenſive arms paſſing with any horſe or carriage, and more than five gallons of ſpirituous liquors not having paid the duty, nor having a permit [c]; obſtructing officers [d]; dangerouſly hurting a [illegible]able and officer [e].

[a] By the 11 Geo. c. 30. If any perſon ſhall harbour, keep, or conceal, or ſuffer to be harboured, kept, or concealed, any prohibited or run goods liable to pay cuſtoms; he ſhall (whether he claim any property in them or not) forfeit the ſame, and treble value, to be recovered and mitigated as by the laws of exciſe, or in the courts at Weſtminſter; half to the king, and half to him that ſhall ſue. § 16.

[b] If any perſon ſhall offer to ſale any prohibited goods, or which have been, or are by him pretended to have been run; the ſame, together with the package, ſhall be forfeited, and be ſeized by the party to whom they are offered to ſale, or by any officer of the cuſtoms or exciſe. Provided that if the ſeizure is within the bills of mortality, then within twenty-four hours, if elſewhere, within forty-eight hours, they be put into the king's warehouſe near the place of ſeizure; and if it be far from any ſuch warehouſe, then in ſome exciſe office near. 11 Geo. c. 30, § 18.

[c] By the 19 Geo. III, c. 69. If any perſons to the number of two or more, ſhall be found paſſing with any horſe, cart, or carriage, whereon ſhall be laden more than ſix pounds weight of tea, or foreign ſpirituous liquors exceeding five gallons, not having paid the duty, and not having a permit; and ſhall carry any offenſive arms, or wear any diſguiſe, when paſſing with ſuch tea or ſpirituous liquors: any officer of the cuſtoms or exciſe, and all other perſons acting in their aid, may arreſt the offenders, and carry them before a juſtice, who (if he ſees cauſe) ſhall commit them to the next county gaol, till the next general quarter ſeſſions. And in ſuch caſe, the officer who conveys any ſuch offender before the juſtice ſhall enter into recognizance in 40l. to appear and proſecute. And the commiſſioners ſhall order the charges of proſecution to be paid by the receiver general of the cuſtoms or exciſe reſpectively. And the juſtices, at ſuch ſeſſions, ſhall hear and determine the offence. And if the offender be convicted, they ſhall, in lieu of any other puniſhment, by any former act, commit him to hard labour in the houſe of correction, not exceeding three years, nor leſs than one. § 9—15.

[d] If any perſon ſhall obſtruct any officer of the cuſtoms or exciſe, in ſeizing uncuſtomed or prohibited goods; or ſhall reſcue, or attempt to reſcue, the ſame; or, after ſeizure, ſhall deſtroy or damage any caſks, boxes, or package, wherein the ſame ſhall be contained; ſuch officers, or perſons acting in their aid, may arreſt the offender, and forthwith carry him before a juſtice near to the place where the offence was committed: and the juſtice ſhall, if he ſees cauſe, commit him till the next general quarter ſeſſions; where, if he ſhall

es have duties to perform for apprehending riotous [f]; and in regard to outlawed ſmugglers [g]. § 3. JURISDICTION OF THE JUSTICES.

, he ſhall be committed of correction to hard la- ceeding three years, nor 19 Geo. III, c. 69, §

y officer of the navy, cuſ- ciſe, ſhall be hindered, ſtructed, or aſſaulted, in ution of his office, by any ſoever; the offender may fore a neighbouring juſ- ay commit him to gaol tt general gaol delivery, ivered by due courſe of he ſhall be convicted, he tenced to hard labour on Thames for three years. offence falls within the 19 Geo. III, c. 69, ſuch commit ſuch offender to he next quarter ſeſſions, and puniſhed as by that 24 Geo. III, c. 47, ſeſſ.

4 Cha. II, c. 11. Where r officers of the cuſtoms any perſon armed with manner of weapon, forci- l, affronted, abuſed, beat- nded, to the hazard of either on board any ſhip, nd or water, in execution e; every perſon ſo abuſ- ich officer or his deputy, all act in his aid or aſſiſt- y the next juſtice or other e committed to priſon to arter ſeſſions; and the ſhall puniſh him by fine, g 100l. and the offender n priſon, till he be diſ- charged by order of the exchequer both of the ſaid and of the impriſon- ment, or diſcover the perſon that ſet him on work. § 6.

f Upon information on oath before a juſtice of the peace, that any per- ſons to the number of three or more, are or have been aſſembled, to be aiding in the clandeſtine running, landing, or carrying away prohibited and uncuſtomed goods, or to reſcue them after ſeizure, and armed with fire arms or other offenſive weapons; he ſhall grant his warrant to the con- ſtables and other peace officers, re- quiring them to take to their aſſiſt- ance as many as may be thought ne- ceſſary for apprehending ſuch per- ſons: and he may, if on examination he find cauſe, commit them to the next county gaol, there to remain without bail or mainprize, until they be diſcharged by due courſe of law: and ſuch perſons, on conviction of their being aſſembled and armed as aforeſaid, ſhall be adjudged guilty of felony, and tranſported for ſeven years. 9 Geo. II, c. 35, § 10.

g 19 Geo. II, c. 34. If any per- ſons, to the number of three or more, armed with fire arms or other offen- ſive weapons, ſhall be aſſembled in order to aſſiſt in the exportation of goods prohibited to be exported, or in running any prohibited or uncuſ- tomed goods, or goods liable to pay duties which have not been paid, or in relanding goods after drawback, or in reſcuing the ſame after ſeizure, or in reſcuing any perſon apprehend- ed for any offence made felony by

§ 3. JURISDICTION OF THE JUSTICES.

FARTHER, any one juſtice is authorized to examine into and report concerning any failure by officers in the performance of their duty [h].

JUSTICES have likewiſe power to hear and judge, in caſes of ſeizure by officers of cuſtoms, of carts, horſes, &c. for removing ſmuggled goods [i].

§ 4. PROCEDURE.

IV. THE form of procedure, and manner of regulating this ſtatutory juriſdiction, in regard to the cuſtoms, is much the ſame with what obtains in exciſe proſecutions, and to that chapter we may refer.

any act relating to the cuſtoms or exciſe, or in preventing his being apprehended; or if any perſon ſhall have his face blacked, or wear any diſguiſe, when paſſing with ſuch goods; or ſhall forcibly hinder or aſſault any officer in the ſeizing ſuch goods, or dangerouſly wound any officer attempting to go on board any veſſel, or ſhoot at or wound him when on board; he ſhall be guilty of felony without benefit of clergy. § 1.

[h] If any officer of the cuſtoms or exciſe ſhall not uſe his beſt endeavours to ſeize any tea, coffee, or foreign ſpirituous liquors, or to ſtop, detain, and carry before one or more juſtices any offender; in ſuch caſe, one juſtice reſiding near to the place where ſuch officer ſhall make default, on complaint thereof made to him within three months after ſuch default, may examine into the truth of ſuch complaint: and if it ſhall appear to the ſaid juſtice that there is reaſonable ground for the complaint, he ſhall tranſmit the ſaid complaint, together with the examinations taken before him thereon, unto the commiſſioners of the cuſtoms or exciſe reſpectively; who ſhall, by ſuch ways and means as to them ſhall ſeem meet, examine into the truth of the premiſes. And in caſe they ſhall think fit on the ground thereof to diſmiſs the officer from his majeſty's ſervice, he ſhall be incapable of executing any office in the cuſtoms or exciſe for the future. Provided, that no perſon ſhall be compelled to go above five miles from his uſual place of abode, to be examined before any juſtice, upon any complaint made to him as aforeſaid. 19 Geo. III, c. 69, § 32.

[i] 24 Geo. III, c. 47, § 30.

CHAP. XIV.

Of the Jurisdiction of Justices of Peace in relation to the Excise.

§ 1. IN GENERAL.

DIRECTLY oppoſite in its nature to the cuſtoms is the exciſe duty, which is an inland impoſition, paid ſometimes upon the conſumption of the commodity, or frequently upon the retail rate, which is the laſt ſtage before conſumption[a]. The comparative advantages and diſadvantages of theſe two methods of taxation are taken notice of by judge Blackſtone, and explained at large by Dr. Smith. The ſubject lies in our way, neither in its political nor mercantile conſequences, but merely as impoſing legal duties on juſtices of peace; and ſhall not therefore be conſidered, unleſs ſo far as appears neceſſary to underſtand in general the nature and extent of the powers of this magiſtracy, in relation to the exciſe.

Its nature.

Original eſtabliſhment.

THE original eſtabliſhment of the exciſe was in 1643, by the parliament at Weſtminſter, and its progreſs was gradual,

[a] Blackſtone, B. i, c. 8, p. 317.

§ 1. IN GENERAL.

being at firſt laid on thoſe perſons and commodities, where it was ſuppoſed the hardſhip would be leaſt perceivable, viz. the makers and venders of beer, ale, cyder, and perry. This example the royaliſts at Oxford ſoon followed, by impoſing a ſimilar duty. The parliament at Weſtminſter ſoon after impoſed it on fleſh, wine, tobacco, ſugar, and ſuch a multitude of other commodities, that it might fairly be denominated general. It was continued during the Uſurpation. Upon king Charles return, ſome part of it was given to the crown by way of purchaſe for the feudal tenures, and other oppreſſive parts of the hereditary revenue [b]. It has ſince that period been impoſed on abundance of other commodities in the reigns of king William III, and every ſucceeding prince. Thus ſpirits are now exciſed at the diſtillery; printed ſilks and linens at the printers; ſtarch at the makers; gold and ſilver wire, at the wiredrawers; all plate whatſoever in the hands of the vender, who pays yearly for a licence to ſell it. To theſe we may add coffee and tea, chocolate, and cocoa paſte, for which the duty is paid by the importer; all artificial wines, commonly called ſweats; paper and paſteboard, firſt when made, and again if ſtained or printed; malt, as before mentioned; vinegars; and the manufacture of glaſs; for all which the duty is paid by the manufacturer; hops, for which the perſon that gathers them is anſwerable; candles and ſoap, which are paid for at the makers; malt liquors brewed for ſale, which are exciſed at the brewery; cyder and perry, at the vender's; and leather and ſkins, at the tanner's.

THE exciſe was firſt introduced in Scotland likewiſe about the ſame period [c]; and warrant was given to magiſtrates of boroughs, and elders and deacons of landward pariſhes, to appoint perſons for collecting the exciſe, with a pecuniam

b Blackſtone, B. I, p. 319.

c Act 1644, 36.

for their trouble [d]. Certain duties were impoſed upon wine, vinegar, ſoap, ſalt, tobacco, cloth, hats, gloves, and other goods imported from abroad, to be levied by the commiſſioners of exciſe, who were to put the ſame in form or collection to the beſt avail [e]. The exciſe on foreign and inland commodities, impoſed by 1661, c. 14, was made perpetual, and annexed to the crown [f]. At length, by the ſeventh article of the Union, it was declared, that the exciſe ſettled in England ſhould take place through the whole united kingdom; excepting only that the thirty-four gallons Engliſh barrel of beer or ale, anſwering to twelve gallons Scots, ſold in Scotland by the brewer at 9s. 6d. ſterling, excluding all duties, and retailed including duties, and the retailer's profit at 2d. the Scots pint, be not liable after the Union to any higher impoſition than 2s. ſterling.

§ 1. IN GENERAL. Exciſe laws.

II. HERE, too, conſolidation acts having become neceſſary, it was declared by 43 Geo. III, c. 69, that the duties under the management of the commiſſioners of exciſe, and drawbacks, ſhould ceaſe from July 3, 1803 [g], and, inſtead thereof, certain new duties are to be levied [h], and

§ 2. 43 G. III, c. 69, CONSOLIDATION ACT.

[d] 1645, c. 4.

[e] 1661, c. 14. See as to other articles 1673, c. 1, 2; 1693, c. 3; 1695, 28, 29; 1696, c. 2; 1698, c. 23.

[f] 1685, c. 2.

[g] This repeal included the whole, unleſs what were ſpecially excepted as malt duties under 43 Geo. III, c. 3, duties upon malt, tobacco, and ſnuff, continued by 43 Geo. III, c. 4. It repeals, however, the duties as to tobacco licences and tobacco of Spain and Portugal. See 29 Geo. III, c. 68, § 2, 70.

[h] Schedule A, B.

It contains, alphabetically arranged, the following articles; auctions, beer, bricks and tiles, candles, cocoa nuts and coffee, cyder and perry, glaſs, hides and ſkins, hops; licences for auctioneers, for brewers, for candlemakers, for dealers in wax or ſpermacetti candles, for dealers in tea, coffee, chocolate, cocoa, glaſsmaker, tanner, tawer, dreſſer of hides, currier, maker of vellum, maker of malt for ſale, maker of mead for ſale, paper maker, traders in plate, calicoe printers, ſoap makers, diſtillers of low wines or ſpirits for ſale, rectifiers of ſpirits, retailers of ſpirituous liquors, ſtarch makers, maker of made wines other than mead, for ſale, retailers of Britiſh wines, manufacturers of tobacco, dealers therein, makers of vine-

§ 2. 43 GEO. III, c. 69, —CONSOLIDATION ACT.

allowances, bounties, and drawbacks[m], given. But these new duties are under the management of the respective commissioners of excise, and, as well as the drawbacks, accounted for and levied just as the former duties, unless where the contrary is expresly mentioned[a]. The duties, when imposed on the specific quantity, are paid in proportion to the actual quantity[b]. The duties are carried to the British consolidated fund[c]. This act does not affect annuities payable by the commissioners of excise, or out of the revenue of excise[d]; nor his majesty's hereditary revenue in Scotland[e]. The amount of what would have been the hereditary duties of excise, shall be computed, set apart, and paid out of the new duties[f]. This act does not void licenses granted by any law of excise. The statute declares, that thirty-six gallons shall be reckoned a barrel of beer or ale, made by common

Barrel, its contents.

gar for sale, retailers of foreign wine, wire-drawers, malt, mead, paper, printed goods, salt, soap, spirits, starch, sweets, tea, tobacco and snuff, verjuice, vinegar, wine, wire.

Schedule B contains the countervailing duties of excise on certain commodities imported from Ireland into Great Britain, as follows:

Beer, bricks and tiles, cyder and perry. hops, mead, vellum and parchment, paper, spirits, British, that is, *aqua vitæ*, or strong waters distilled in Ireland, wire.

[m] Schedule C.

The allowances are on the following articles: viz. Paper, used by woollen clothiers, and in printing certain books; salt, used in making oxygenated muriatic acid, for the purpose of bleaching; soap, used in the woollen manufactory, in whitening new linen, in preparing any manufacture from flax or cotton; starch, used in preparing manufactures from flax and cotton, or new linen; wine, for the use of the navy.

The bounties are on the following articles: Beer exported, when barley is at the price mentioned in the statute; salt, used in curing fish.

The drawbacks are on the following articles: viz. Beer, bricks and tiles, candles, chocolate, cyder and perry, glass, hides and skins, hops, paper, printed goods, salt, soap, starch, tea, tobacco, wine, wire exported under certain circumstances, as particularly stated in the act.

[a] § 3, 4.
[b] § 5. [c] § 6.
[d] § 8, 9. [e] Ibid.
[f] § 9. See also 27 Geo. III, c. 13, § 51.

ewers in Great Britain, and that the allowance ſhall be ree gallons out of that quantity for waſte[g], which allow- ce is to be in full of all loſſes. Common brewers are not ſell ale or beer at any other than the above rate. But it is preſsly declared that this ſhall not extend or vary the antity to be returned, as a barrel of ale brewed by any re- ler or other perſon than the common brewer, who ſells or ps beer out publicly or privately. § 2. 43 GEO. III, c. 69, —CONSOLIDATION ACT. Retailers' barrel.

BUT it is not neceſſary here to go farther into the particulars this ſtatute, and ſtill leſs into the minutiæ of the duties which e frequently altered and increaſed, and of courſe can be known ly from the ſaid ſchedule and ſubſequent enactments. All at is neceſſary for a work of this kind, ſeems to be, to ex- ain the general nature of that juriſdiction of juſtices in ex- ſe matters, and the methods of explicating it. The magiſ- ate underſtanding theſe, has all the information which it is ſible for any man to carry about with him. The ſtatement particular duties in detail will be found in Mr. Huie's bridgement of the Exciſe Statutes; and when caſes come be tried by juſtices under the exciſe laws, the particular atutes muſt be reſorted to.

III. THE foundation of the juriſdiction of the juſtices of ace in exciſe queſtions, is the ſtatute 12 Cha. II, c. 24, § 45, y which it is provided, "that all forfeitures and offences ainſt ſuch act, or any clauſe or article therein contained, all be adjudged," if within the limits of the chief office in ondon, and be heard and determined by the commiſſioners, in caſe of appeals, by the commiſſioners of appeal[h], in all any other counties, cities, towns, or places, ſhall be heard § 3. JURISDICTION OF THE JUSTICES.

[g] § 12.

[h] In an act of 1 Geo. II, ſt. 2, c. 16, §. 5, offences and forfeitures within the limits of the chief office, may be heard by three commiſſioners of exciſe, and in the record of their pro-

§ 3. JURISDICTION OF THE JUSTICES.

and determined by any two or more juſtices of the peace, "*reſiding near*" to the place where ſuch forfeitures ſhall be made, or offence committed, and in caſe of neglect or refuſal of ſuch juſtices by the ſpace of fourteen days next after ſuch complaint being made, and notice thereof given to the offender; then the ſub-commiſſioners appointed for any ſuch city, county, or town, may hear and determine the ſame, and if the party find himſelf or themſelves aggrieved by the judgment given by the ſaid ſub-commiſſioners, he may appeal at the next quarter ſeſſions to the juſtices of the peace there, who are hereby empowered to hear and determine the ſame, and whoſe judgment ſhall be final; which ſaid commiſſioners for appeals, and chief commiſſioners of exciſe, and all juſtices of the peace, and ſub-commiſſioners aforeſaid, are required upon complaint or information exhibited and brought, of any ſuch forfeitures made, or offence committed, to ſummon the party accuſed, and upon his appearance or contempt, to proceed to the examination of the fact, and on proof made thereof, either upon the voluntary confeſſion of the party, or by the oath of one credible witneſs, to give judgment; and to iſſue warrants under their hands, for levying the ſame upon the goods and chattels of the offender, and to cauſe ſale to be made thereof[1]; and if ſatisfaction be not made within fourteen days, or for want of ſufficient diſtreſs to impriſon the party offending until ſatisfaction be made.

FOR though acts of parliament in conſequence of the extenſion of the duties put under the exciſe, and the frauds practiſed, have increaſed to ſome conſiderable bulk, yet it is

ceedings it ſhall be ſufficient to mention, that the complaint or information is made before three commiſſioners, without mentioning their names.

[1] If not redeemed in not leſs than four nor more than eight days, 12 Geo. II, c. 20, § 1.

to be obſerved, that in all points of procedure, almoſt all of them refer to this ſtatute of Cha. II, termed by the Engliſh lawyers one of the hereditary exciſe acts[i]. § 3. JURISDICTION OF THE JUSTICES.

Besides, the ſtatute 24 Geo. II, c. 40, § 29, contains the following general reference, viz. That all forfeitures, fines, and penalties, impoſed by this or any other act relating to the duties of exciſe, or other duties under the management of the commiſſioners of exciſe, ſhall be ſued for, tried, recovered, or mitigated, by ſuch ways and means as any fine, penalty, or forfeiture, is or may be recovered or mitigated, by any law or laws of exciſe, or in the courts of Weſtminſter, and ſhall be half to the king, and half to him that ſhall inform and ſue[k].

By virtue of theſe references, the Scottiſh juſtices have juriſdiction under the Engliſh ſtatute of Cha. II, independently of the general ſtipulation in the 18th article of the Union, that the laws for the cuſtoms and exciſe ſhould be the ſame in Scotland as in England.

But under thoſe ſtatutes, the ſeſſions of the peace are not a general court for deciding revenue queſtions. It is only touching forfeitures, fines, and penalties, that they are inveſted with juriſdiction. Thus, ſuppoſe a dealer falls into arrears, if payment be inforced by a penalty, it is competent to ſue for it before the juſtices; but if it be in view to recover the arrears themſelves, the ſuit is not competent before the juſtices; it muſt be brought before

The court of exchequer, which, by the act of Union, and by the 6 Anne, c. 26, is inveſted with all powers, as well judicial as otherwiſe, for the hearing and determining of all actions and queſtions in law or equity, touching the reve-

[i] Durnford's Rep. Vol. ii, p. 509. [k] 24 Geo. II, c. 4, § 29, 33.

§3. JURISDICTION OF THE JUSTICES.

nues of the customs and excise, and all other revenues, and all the remedies for recovering the same, and all accounts relating thereto; and all penalties by force of any statute relating to the customs or excise, or by force of any other statute, and all fines, issues, forfeitures, or penalties, of what nature soever arising within Scotland, and all informations or actions, and also all obligations, recognizances, specialties, and other securities relative to the said matters.

JUSTICES of peace, again, have no other jurisdiction in excise matters, unless in virtue of the said general statute of Cha. II, concerning penalties, or, in particular cases, of subsequent enactments. Thus, for example, on account of the expence of exchequer trials, there is given by 6 Geo. I, c. 21, jurisdiction to the justices to condemn foreign spirits seized, where the quantity is within sixty-three gallons; where the issue to be tried is for unlawful importation, and where the prosecution is brought at the suit of the officer, to whom it is optional to file his information in the court of exchequer. But no power is given to the smuggler to complain upon officers; the legislature having foreseen the danger of giving the smuggler a power to bring the merits of the seizure to be tried before any two justices of his own choice; and farther than the statute goes, the justices have no jurisdiction[1].

§4. JUSTICES COMPETENT.

IV. No rule of law is more established than that a judge ought to stand disinterested. In excise questions, this is particularly attended to.

BY 15 Cha. II, c. 11, no commissioner, farmer, or subcommissioner of excise shall act as a justice of the peace in matters relating to the excise. And by 24 Geo. II, c. 40, § 22, no common brewer of ale or beer, inn-keeper,

[1] See Vol. I, p. 111.

or diſtiller, or any perſon intereſted in the ſaid trades, ſhall be capable to grant any licence, or of acting as a juſtice of the peace, in matters which any ways concern the laws concerning diſtillers, or the duty upon ſpirituous liquors, or the retailers thereof. There are, likewiſe, prohibitions againſt other perſons who may be concerned or intereſted in ſome other exciſeable trades, acting in the office of juſtices of the peace [m]. §4. Justices competent.

The ſtatute of Cha. II ſays, "the offences ſhall be heard and determined by any two or more juſtices of peace, *reſiding near the place where ſuch forfeiture ſhall be made or offence committed.*" Reſiding near, what it means?

Theſe words have given riſe to two queſtions, which are often notice of by the Engliſh lawyers.

The one is, whether the juriſdiction be limited to the next juſtices. It is ſettled, however, that the words *reſiding near* are not reſtrictive, but merely directory: Any two juſtices within the bounds, whether next or not, have juriſdiction [n]. It was only meant to imply that the party ſhould not be compelled to take long journies to obtain juſtice [o].

Had the ſtatute uſed the word *next* inſtead of *reſiding near*, the concluſion would have been different. Where the next juſtices are empowered to proceed in any matter they and no other ought to act [p]. But this reſtriction is not implied by ſuch an expreſſion as reſiding near, which does not particularly define the diſtance, or what is meant by the nearneſs [q].

[m] 57 Geo. III, c. 39; 26 Geo. III, c. 59; 29 Geo. III, c. 68; 38 Geo. II, c. 89.

[n] Burn, tit. Exciſe, § 2, p. 24; Shaw. Exc.

[o] Hutcheſon's Exciſe Laws, p. 13.

[p] Burn, ibid.

[q] Hutcheſon, ibid.

§ 4. JUSTICES COMPETENT.

THE other queſtion is, whether theſe words *reſiding near* give juriſdiction to any juſtice reſiding near, who might otherwiſe have been incompetent, as living without the juriſdiction; for example, whether juſtices of a county at large, dwelling near to a town, having juſtices of its own and an excluſive charter, ſhall have power under theſe words to exerciſe juriſdiction therein. It has been determined, that the act did not intend to alter the juriſdiction of juſtices, but only to veſt the juriſdiction in juſtices of counties, cities, and places, with reſpect to their local juriſdictions within ſuch places[r]. This queſtion is not of much importance to us, for a reaſon formerly mentioned[s].

INFORMATIONS—IN GENERAL.

V. INFORMATIONS are of two kinds; ſuch as are merely at the ſuit of the king, and ſuch as are partly at the ſuit of the king and partly at the ſuit of the private proſecutor[t].

ACTIONS on penal ſtatutes are either private, which is, when an action is given upon a ſtatute to the king, and to the party grieved only; or popular, which is, where the action is given to the people in general, that is, to any one that will ſue for the king, and for himſelf.

If the king commence his ſuit.

BUT the king, if he commence his ſuit before the informer, ſhall have the whole forfeiture, (becauſe in ſuch caſe he alſo is the informer), and before the informer begins his ſuit, he may releaſe the penalty to the offender, and bar all others; but if after a popular action is brought by the informer, the king's attorney will enter *ulterius non vult proſequi*, the informer may proſecute for his part[u].

[r] T. 14 Geo. II, Talbott and Hubble Str. 1154; Burn, ibid.

[s] See Vol. I, p. 47.

[t] 2 Hawkins 260; Burn, tit. Information. The latter are called in England, informations *qui tam*; from thoſe words in the information when the proceedings were in Latin: *qui tam pro domino rege quam pro ſeipſo*. Ibid.

[u] Burn, v. Information, Vol. ii, p. 783.

§ 5. INFORMATIONS IN GENERAL.

ND, in general, it ſeems that of common right an inform- n at the ſuit of the king, or an action in the nature there- may be brought for offences againſt ſtatutes, whether they mentioned by ſuch ſtatutes or not, unleſs other methods roceeding be particularly appointed, by which all others impliedly excluded [x].

F a ſtatute prohibits a thing as an offence againſt the lic good in general, under a certain penalty, and gives part thereof to him who will ſue for it, any one may g an action or information, and lay his demand, as well our lord the king, as for himſelf [y].

LSO, where a ſtatute prohibits or commands a thing, the ng, or omiſſion whereof is an immediate danger to the ty, and alſo highly concerns the peace, ſafety, or good ernment of the public, or the honour of the king, or of ſupreme courts of juſtice, it ſeems to be the general opi- n, that the party grieved may bring his action *qui tam* on h ſtatute [z].

UT this doctrine concerning popular actions, does not r apply to the laws of exciſe. For, by 26 Geo. III, c. § 13, it is not lawful for any perſon to commence or ſecute, or cauſe to be commenced or proſecuted, any ac- or information in any of his majeſty's courts, for the very of any fine, penalty, or forfeiture, incurred by any now in force, or hereafter to be made, relative to either is majeſty's revenues of cuſtoms or exciſe, unleſs in the ne of his majeſty's attorney general, or of ſome officer of ſaid revenues; and if any action or information be com-

Under the exciſe laws only officers can ſue.

[x] Ibid.

[y] Ibid. If the penalty is partly e king and partly to the proſe- r, it is called, in the Engliſh law, a *qui tam* information, becauſe he ſues *tam pro domino rege quam proſequitur*.

[z] Ibid. 265.

§ 5. INFORMATIONS GENERAL.

menced or profecuted in any other perſon's name, the ſame and all proceedings thereupon had, are hereby declared to be null and void; and the court where ſuch action or information ſhall be ſo commenced or profecuted, ſhall not permit or ſuffer any proceedings to be had thereupon. If any profecution ſhall be commenced or depending by any officer of cuſtoms or exciſe, for the recovery of any fine, penalty, or forfeiture, incurred by virtue of any act of parliament now in force, or hereafter to be made, relating to the ſaid revenues, it ſhall be lawful for his majeſty's attorneys general, in caſe it ſhall appear to his ſatisfaction that ſuch penalty, fine, or forfeiture, was incurred without any intention of fraud, to ſtop all further proceedings, by entering a *noli proſequi*, or otherwiſe, on every ſuch information, as well with reſpect to the ſhare of ſuch fine, &c. which any ſuch officer may claim, as to the ſhare thereof belonging to his majeſty[a].

Entered.

ALL informations, complaints, and other proceedings, as well before the commiſſioners of exciſe as juſtices of peace, by virtue of the 6 Geo. I, c. 21, or any other act relating to the duties of exciſe or other duties, under the management of the commiſſioners of exciſe, muſt be entered and inrolled in Engliſh[b].

Verbal.

DR. BURN, however, obſerves, it is not neceſſary that the information be exhibited in writing; but if it is a verbal information, the juſtices ought to make a record thereof, and of the time and place, when and where exhibited, which muſt be expreſſed in the preſent, and not in the time paſt: But to ſave the juſtices that trouble, it is uſual for the informer to prepare his information in writing; and by way of preface thereto, to make a memorandum of the time and place of the laying ſuch information, leaving therein blanks

Record thereof.

[a] 26 Geo. III, c. 77, § 14. [b] 6 Geo. I, c. 21, § 23.

for the names of the juſtices, and the day and month, and year and place when and where laid; and when thoſe blanks are filled up by direction or conſent of the juſtices, then it becomes a record made by them. The mentioning the place where the information is laid, is, that it may appear that the proſecution was in the proper county; and therefore though it may happen, that for laying the information, the proſecutor may be obliged to attend one juſtice in one town, and another juſtice in another town, it muſt not be mentioned, that the information was laid at both towns, for that would be abſurd; but in ſuch caſes it is uſual to expreſs that the information is laid at the town where the hearing is intended to be.

Certainty of.

BUT whatever certainty is required in an indictment, the ſame at leaſt is neceſſary alſo in an information; and conſequently all the material parts of the crime muſt be preciſely alleged, and not by way of argument or recital [c], that the party may know what to anſwer to, and the court what to give judgment upon.

IN England, ſeveral convictions have been quaſhed for want of an exact deſcription of the offence: But the particular day need not be mentioned [d]: it has been held ſufficient if the offence be deſcribed as having been committed *within ſuch and ſuch a time*, provided it be ſhewn to be within the limited time [e].

Muſt the ſtatute be recited?

IT does not appear to be abſolutely neceſſary to recite the ſtatute upon which the offences are created, or information grounded. But it is the ſafeſt and beſt way to deſcribe the offence in the words of the ſtatute [f]. If the proſecutor recit-

[c] Burn, Vol. ii, p. 689.
[d] Hutcheſon's Exciſe Laws, c. 7.
[e] 10 Mod. Rep. 284; Salk. 369, 378; Hutcheſon's Exciſe Laws, ib.
[f] Hawk. 100; Hutcheſon, ibid. 42.

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ing a ſtatute, materially varies from a ſubſtantial part thereof, he vitiates ſuch indictment or information. A variance, however, not altering the ſenſe of a ſtatute, or being a part immaterial, *ex abundanti*, doth not hurt [m]; and, in general, in the words of lord Mansfield, "ſlips and miſtakes of the pen ought not to be fatal, it being eſſential to the adminiſtration of juſtice, that they ſhould not."

If the indictment be well laid, part only.

If the proof be partial only.

If an information contain ſeveral offences againſt a ſtatute, and be well laid as to ſome of them, but defective as to the reſt, the informer may have judgment for as much as is well laid. Or, if an information ſhould be laid for more than is proved, yet it will be effectual for as much as is proved. If it ſtates, that the defendant brewed ſo many barrels of ſtrong beer, and ſo many barrels of ſmall beer; and there be proof of the brewing of the latter only, or of fewer barrels than was alleged; yet ſuch evidence will authorize the juſtices to convict for ſo much as is proved [n].

If an information againſt a common brewer for omitting to make proper entries, is intended to be laid for more than one neglect of the weekly or monthly entry, it will be proper to ſpecify diſtinctly the number of weeks, months, &c. becauſe the forfeiture will be more or leſs, according to the number of weeks or months in which ſuch neglect hath been made: but it will not be neceſſary to prove the omiſſion during all the weeks, &c. and the juſtices will be warranted to convict for ſo many weeks, &c. as ſhall be proved [o].

[m] 2 Hawk. 102; Hutcheſon, ibid.

[n] Burn, ii, 789.

[o] N. B. This obſervation applies to all offences under the exciſe laws, where the acts of offenſe againſt them are ſeveral. And in R. v. Vaſey, 17 Geo. III, c. 30, in a conviction on the auction act, it was not ſaid whether committed within or without the bills of mortality, though a difference of penalty attaches; but the offence was laid to be done at B. in the county of B. which lord Mansfield ſaid was ſufficient.

Alſo in all caſes where the rates and duties are different, according to the different qualities of liquors, or names of articles of manufacture; the particular quality, as well as quantity, of ſuch ought to be mentioned in informations for the amount of the duty, or double value of ſuch duty, as ſome articles of manufacture have higher duty laid upon them than others of a ſimilar nature. §5. INFORMATIONS—IN GENERAL. General rule where the duties differ according to the quality of the liquor.

In an information for non-entry of goods ſubject to the excife, the quantity is not material to be mentioned in an information, unleſs a penalty alſo attaches upon the quantity.

It will not be neceſſary for a proſecutor to prove all the allegations and circumſtances mentioned in an information as the manner, degree, proportion, or number of inſtances, but ſuch particulars are therein alleged to have happened. There are technical modes of drawing indictments and informations, to make them conſonant to the forms of law, and to render them proper for the cognizance of the court of commiſſioners, juſtices of the peace, or ſuperior courts: the omiſſion of theſe forms might be ground for quaſhing the information: yet it is not at all neceſſary that every ſuch allegation, or general aſſertion, ſhould be proved by evidence.

In general, penal ſtatutes, containing no particular limitation in point of time, are underſtood to be governed by 31 Elizabeth, by which all actions, ſuits, bills, indictments, or informations on any penal ſtatute, whereby the forfeiture is limited to the king, ſhall be brought within two years after the offence committed; if limited to the king, and to any other who ſhall proſecute, then within one year; and in default of ſuch proſecution, then to be brought for the king, in two years after that year ended. —LIMITATION OF

§ 5. INFORMATIONS —LIMITATION OF.

THE ſtatute of Cha. II ſpecifies no particular time for proſecuting offences againſt the laws of exciſe. But by 1ſt William and Mary, c. 25, § 16, no information ſhall be brought, laid, or proſecuted, againſt a common brewer, for any falſe or miſentry, or other offence, unleſs within three months next after ſuch offence; and that notice be given the defender in writing, or left at his dwelling-houſe, within one week after laying or entering the information. And by 12 and 13 William III, c. 11, § 17, a ſimilar regulation was made in favour of common diſtillers, vinegar-makers, cider-makers. Theſe ſtatutes are underſtood to apply to all proſecutions on the exciſe laws before the juſtices of peace.

BUT if an offence prohibited by a penal ſtatute, be alſo an offence at common law; the proſecution of it, as of an offence at common law, is no way reſtrained hereby[r]. The limitation applies to a common informer only; the party grieved is not within the reſtraint of this ſtatute, but after that period may ſue in the ſame manner as before[s]. If two informations be exhibited on the ſame day, for the ſame offence, they mutually abate one another[t].

—FORUM.

IT is provided by the 21 James, c. 4, that all offences againſt any penal ſtatute, for which any common informer may ground a popular action, bill, plaint, ſuit, or information, before the judges of aſſize, or juſtices of the peace in their general or quarter ſeſſions, (having power to hear and determine the ſame), ſhall be proſecuted in the county where they were committed, and not elſewhere: and if the offence is not proved to have been committed in the ſame county, the defendant ſhall be found not guilty[u].

[r] 2 Hawk. 272.

[s] Ibid.

[t] Ibid. 275.

[u] § 1, 2. Provided that informations, ſuits, or actions, againſt popiſh recuſants, or perſons charged with maintenance, champerty, or buying of titles, may be laid in any county. § 5.

§ 3. INFORMATION —FORUM.

THIS ſtatute is not underſtood to extend to any offence created ſince the date of it; ſo that proſecutions on ſubſequent penal ſtatutes are not reſtrained thereby; but this ſtatute is as to them, as if it were repealed *pro tanto* [x].

NOR to any ſuit by a party grieved, or by the attorney general; but only to thoſe brought by common informers [y].

BY the 15 Cha. II, c. 11, § 22, it is provided, that all differences, appeals, and complaints, that ſhall ariſe between party and party, in order to the payment of the duty of exciſe, ſhall be heard in the county where they are ſo, and not elſewhere. This regulation, however, afforded delinquents an opportunity of eſcaping altogether. By removing from the juriſdiction where the offence had been committed, or where the duties were charged, they thus avoided any proſecution. It was therefore made competent to the commiſſioners or juſtices in whoſe juriſdiction the offender was found, to take cognizance of the offence, as if it had been here committed [z].

[x] 1 Salk. 372.

[y] 2 Hawk. 269, 270.

[z] 18 Geo. II, c. 26, § 13. "And whereas by the laws now in force concerning the duties of exciſe, and other duties under the management of the commiſſioners of exciſe in that part of Great Britain called England, all forfeitures and offences made and committed within the inmediate limits of the chief office in London, are to heard, adjudged, and determined by the chief commiſſioners and governors of exciſe; and all ſuch forfeitures and offences made and committed within all or any other the counties, cities, towns, or places in England, are to be heard and determined by any two or more of the juſtices of the peace reſiding near to the place where ſuch forfeitures ſhall be made, or offence committed. And whereas many perſons chargeable with duties of exciſe, or other duties under the management of the ſaid commiſſioners, or incurring penalties by offences againſt the ſaid laws, do frequently avoid proſecutions for the ſame, by removing out of the juriſdiction wherein ſuch duties were charged, or offences committed, to the great prejudice of the revenue, and diſcouragement of the fair traders: For remedy whereof, be it further enacted by the authority aforeſaid, that from and after the ſaid

§ 5. INFORMATION —FORUM.

IT is enacted by ſtatute 32 Geo. III, c. 10, § 1 and 2, that in caſe any perſon againſt whom any body warrant ſhall be iſſued, by any three commiſſioners of exciſe in England, or by any juſtice of peace in Great Britain, by virtue of any act now in force, or hereafter to be made, relating to the duties of exciſe, ſhall go into any other place out of the juriſdiction of the commiſſioners granting ſuch warrant, it ſhall be lawful for any three of the ſaid commiſſioners, or any juſtice of peace of the place where ſuch perſon ſhall be, upon proof on oath of the hand-writing of the commiſſioners or juſtice granting ſuch warrant, to indorſe their names on ſuch warrant; which ſhall be a ſufficient authority to the perſon bringing it, or any other to whom it is directed, to execute it there, and bring the offender before the commiſſioner or the juſtice indorſing it, or ſome other of the ſame juriſdiction, who, by indorſement upon ſuch warrant, may commit ſuch offender to the common gaol, or houſe of correction,

Indorſation of warrants.

24th day of June 1785, it ſhall and may be lawful for the ſaid commiſſioners and juſtices reſpectively, within whoſe juriſdiction any perſon charged with any of the ſaid duties, or who ſhall have committed any offence againſt the ſaid laws, or any of them, or againſt this act, ſhall be found, to ſummon, hear, adjudge, and determine, and iſſue any proceſs or warrant in the ſame manner as ſuch commiſſioners or juſtices may now do in caſe of ſuch offences as are committed within their reſpective juriſdictions: And in caſe the ſaid commiſſioners or juſtices ſhall, upon any judgment given by them reſpectively, iſſue a warrant or warrants of diſtreſs, and the perſon or perſons authorized to execute ſuch warrant, or any of them, ſhall make a return thereof, that no ſufficient diſtreſs can be found, then it ſhall and may be lawful for the ſaid commiſſioners and juſtices reſpectively, within whoſe juriſdiction the party ſhall at any time be found, againſt whom ſuch warrant ſhall have been iſſued, upon producing to them ſuch warrant, and return thereof, to commit ſuch offender, to the next county gaol till ſatisfaction be made.

And by the 5 Geo. III, c. 43, § 16, it is ordained; that all the powerful proviſions enacted by 28 Geo. II, c. 26, ſhall be put in execution againſt all perſons who ſhall commit any offences againſt any acts concerning the duties of exciſe, or any duties under the management of the commiſſioners of exciſe in England and Scotland.

ection, where it ſhall be executed, there to remain till duly delivered. § 5. INFORMATION —FORM.

THE juſtices or commiſſioners indorſing ſuch warrants, e not reſponſible for any inaccuracy in the original warrant.

BUT certain offences may be tried in any county, as aſſaults upon officers of cuſtoms or exciſe [b]; offences made felony by 19 Geo. II, c. 34, or by any other act relating to e cuſtoms or exciſe [c]; aſſaults upon officers of the ſalt duties, or perſons acting in their aid [d]; every offence declared felony or miſdemeanour by 42 Geo. III, ſeſſ. 2, c. 47, if be committed in Scotland, information may be given to ny juſtice, who ſhall grant warrant for committing the offender to gaol, until liberated in due courſe of law; and he ay be tried before the court of juſticiary and circuit courts, before the high court of admiralty at Edinburgh, or in aſe the offence be only puniſhable by hard labour or imprionment, the ſame may be tried before the judge ordinary of e county where the warrant was granted [e]. Certain offences triable any where.

BY the 32 Geo. II, c. 17, § 1 and 2, it is provided, that all cafes relating to the exciſe, or to any of the duties under the management of the commiſſioners of exciſe (except where particular proviſions are made for ſummoning offenders, or for condemning ſeizures made from perſons unknown) be leaving a ſummons for the offender at his houſe, workouſe, ſhop, cellar, vault, or uſual place of reſidence, or with is wife, child, or menial ſervant, directed to him by his right or aſſumed name, ſhall be deemed as legal and effectual a notice or ſummons as if perſonally delivered into the hands of the party, and as if directed to him by his proper name. —CITATION OR SUMMONS.

[b] 9 Geo. II, c. 35, § 26.
[c] 43 Geo. III, c. 157, § 2.
[d] 25 Geo. III, c. 63, § 11.
[e] 24 Geo. III, ſeſſ. 2, c. 47, § 5.

§ 6. PROOF —CITATION OF WITNESSES.

VI. By ſtatute 7 and 8 Will. III, § 24, it is made lawful for the commiſſioners of exciſe and juſtices of peace reſpectively, upon any information exhibited before them for any offence committed againſt the laws of exciſe, to ſummon any perſon other than the party accuſed, to appear before them at a certain day, time and place inſerted in ſuch ſummons, and to give evidence.

What evidence is competent in exciſe queſtions.

THE mode of proof pointed out by 12 Cha. II, c. 23, § 31, and c. 24, § 45, is the party's voluntary confeſſion, or one or more witneſſes. Here, therefore, the Scottiſh common law has no place. Hence, on the one hand, two witneſſes are not neceſſary; if there be one credible witneſs, that will ſuffice; and hence, on the other hand, reference to oath, a thing unknown in the law of England, is not admiſſible in queſtions regarding the exciſe or cuſtoms.

IN trials of ſeizures, the juſtices muſt go into the merits of the caſe, without enquiring into the form and manner of the ſeizure [f].

—ONUS PROBANDI.

IF, on trial, any diſpute ſhall ariſe whether the exciſe or inland duties have been paid for any foreign goods ſeized, the proof lies on the owner, and not on the officer [g]; and if any goods liable to duties of exciſe or inland duties ſhall be ſeized, or if any action ſhall be brought by the owner or claimer of any ſuch goods againſt any officer of exciſe or his aſſiſtant, the proof of payment of the duties lies upon the owner or claimer, and not on the perſon who ſeized the ſame, or againſt whom the action ſhall be brought [h].

[f] 9 Geo. II, c. 35, § 34.

[g] 6 Geo. c. 21, § 41; and 12 Geo. c. 28, § 8.

[h] 23 Geo. III, c. 70, § 35. Burn, tit. exciſe, § 2, v. 2, p. 35. In this and other paragraphs, *exciſe* and *inland* duties are uſed ſynonimouſly. If any real diſtinction ever obtained between *exciſe laws* and *inland duties under the management of the commiſſioners of exciſe*, it is now obſolete; and dropped in the later exciſe acts. In deli-

§6. PROOF—DECREET IN ABSENCE.

IN excise prosecutions, the party not appearing is not holden confessed; decree in absence does not pass of course. The statute directs, "upon his appearance or *contempt* to proceed to the examination of the fact, and, on due proof, &c." If the defender, therefore, appears not, the prosecutor must examine witnesses, or otherwise prove his libel ust as if he were present.

If he attend.

SHOULD the defender appear, and continue present, or by leave attend by his attorney and counsel, he or they are entitled to cross-examine any witness produced to prove the charge, or object to the competency or credibility of such with the same liberty as is used in the superior courts.

Cross questioning the witnesses.

Evidence must be taken in the hearing of the defender.

In order that the defender may have this liberty of cross-examination, it is a settled rule in law, after plea or issue joined, that all evidence must be given in the presence or hearing of the defendant, or his counsel. But no evidence ought to be given before the defendant be called to answer the charge. The reading over the evidence afterwards hath been held not sufficient. However, it hath been held sufficient, if it appear upon the record made and from what is there stated, that the defendant was present, pleaded not guilty, and heard the evidence. The court will presume that the witness was examined in his presence[1].

ing the judgment of the court of king's bench in the case, "the King v. the Justices of Surry," judge Ashhurst said, that in attending to the construction of the act 25 Geo. III, c. 72, he was led "to apply to a person who was long experienced in the affairs of excise, to know what was the distinction generally understood between *excise laws* and *inland duties under the management of the commissioners of the excise*. He said, the difference they understood is this, that the law of excise is understood to relate only to *liquors*; and that inland duties under the management of the commissioners of excise are understood to relate to *malt*, *dry goods*, and other articles which have of late been put under their management." Durnf. Rep. v. 2, p. 510.

[1] 3 Bur. 1785; Hutcheson, ibid.

§ 6. PROOF. The ſame advantage of croſs-examination, alſo, ariſes to a proſecutor upon any evidence produced by a defendant in exculpation.

THE general rules of evidence, which we had already occaſion to explain, apply to exciſe as well as other proſecutions[p]. Only it may be proper to keep in memory, that as informations upon the laws of exciſe are partly civil and partly criminal, ſo the ſtricteſt rule of evidence muſt be adopted; and nothing ſhort of ſome poſitive fact, done or committed by a defendant, or his known agent or ſervants, in ſuch their capacity, and with the known or implied conſent of a defendant, can be admitted[q].

§ 7. JUDGMENT. VII. AFTER the evidence in the caſe is gone through, the juſtices are to form their judgment; which muſt be ſupported by the information and the evidence, and ought to make the fact appear, that the court of review may be able to judge whether the conviction be agreeable to law or not. Thus, if a ſtatute direct an information to be on oath, the conviction ought to ſhew ſuch oath to have been taken[r].

Muſt make the fact appear to the court of review.

IT has been ſaid, that whatever is recorded by the juſtices or their order, ought to be expreſſed in words of the preſent time and tenſe: Yet that doth not make it neceſſary, nor is it indeed practicable, that all that is to be ſo entered ſhould actually be entered at the inſtant of time when ſuch judgment is given; for ſuch entering the whole at that time would hinder the diſpatch of buſineſs, and delay the hearing of cauſes. It therefore may be done at any convenient time after; and if it be agreeable with, and according to, ſuch ſhort minutes or notes as are then taken by the juſtices, it will be as authentic as if it had been entered at the inſtant

[p] See Vol. i, p.
[q] Hutcheſon, ibid. p. 76, 77.
[r] Ibid. p. 109.

of time in which ſuch order was made, or judgment was given [s]. §7. JUDGMENT.

WHEN the record is made up, and the conviction completed, it muſt be under the hands of the ſame juſtices, and the information muſt be fully ſtated. Juſtices in all caſes ought to return convictions to the ſeſſions, whether an appeal lie or not [t]. If there be a time limited by an act creating an offence, the preciſe time of the offence committed, or information brought, and alſo of the conviction, muſt be ſhewn [u]. Signed. Conviction to be reported to the quarter ſeſſions.

IF the ſtatute give the penalty in certain proportions, the conviction need not declare the diſtribution thereof [x]. But where the ſtatute requires the juſtices of peace to diſtribute the penalty among certain perſons, according to their diſcretion, an adjudication, that the forfeiture be diſpoſed of as the law directs, is bad. The juſtices ought to adjudge what the proportions ſhould be [y]. Conviction need not ſtate the diſtribution of the penalty.

AN information on a popular ſtatute cannot be compounded after conviction; the penalty having then become veſted. By the ſtatute of 18 Elizabeth, c. 5, no informer or plaintiff is to compound or agree with any perſon that ſhall offend, or be furniſhed to offend, againſt any penal ſtatute, for any offence committed, or pretended to be committed, but after anſwer made in court to the information or ſuit in that behalf exhibited or proſecuted. Nor after anſwer, but by order or conſent of the court in which the ſame information or ſuit ſhall be depending, on pain, that whoever ſhall offend in making compoſition, or other miſdemeanour contrary to the ſtatute, or ſhall by colour or —COMPOUNDING.

[s] Shaw. Exc. Burn, v. 2, p. 31.
[t] Hutcheſon, 122.
[u] Ibid. p. 11.
[x] 2 Term. Rep. 96; Hutcheſon, ibid. 115.
[y] Ibid.

§ 7. JUDGMENT.

pretence of proceſs, or without proceſs, upon colour or pretence of any matter of offence againſt any penal law, make any compoſition, or take any money or reward, or promiſe of reward, for himſelf, or to the uſe of any other, without order or conſent of ſome of her majeſty's courts of Weſtminſter, and ſhall be thereof convicted, ſhall ſtand in the pillory, &c. and be for ever diſabled to purſue or be plaintiff or informer in any ſuit or information, upon a ſtatute popular or penal, and ſhall alſo forfeit 20l. &c. This ſtatute is made perpetual by 27 Eliz. c. 10. It extends to ſuits by common informers, but not to thoſe by the party aggrieved[a]; it extends to *qui tam* informers, (who can ſue only for a part of the penalty), as well as to thoſe who ſue for the whole penalty[b]; and to ſubſequent penal ſtatutes, as well as to thoſe exiſting at the time; and to compounding of ſuits commenced in courts which have no juriſdiction, as much as if they had[c].

THE act of 21 James I, c. 3, reſpecting compounding of ſuits, &c. is not to extend to any warrant of privy ſeal, made or directed by the king to the juſtices of either bench, &c. or of the peace, or other juſtices for the time being, having power to hear and determine offences done againſt any penal ſtatute, to compound for the forfeitures of any penal ſtatute depending in ſuit, and queſtion, before them, or any of them reſpectively, after plea by the defendant.

—MITIGATION.

THE juſtices of peace, commiſſioners of excife, or any two of them, according to their diſcretion, may compound or leſſen the penalty[d]. But the mitigation muſt not be leſs than double the value of the duty of excife, which ſhould have been paid, beſides the reaſonable coſts and charges of

[a] Buller's Law of *Niſi Prius*, 196.
[b] Cowper, 366.
[c] 1 Keb. 806. 1 Sidenſin, 312. Hutcheſon, 125.
[d] 12 Car. II, c. 23, § 23; c. 24, § 46.

s as were therein employed, to be allowed by the

§ 5. JUDGMENT —MITIGATION.

ſt every act it is enacted, that all powers in the 12 Charles II. c. 24. ſhall be applied in relation ies of each particular act, as fully as if ſuch powers ited.

ſt of the modern exciſe and penal ſtatutes are parthis and other reſpects.

act for laying a duty upon hides, &c. the juſtices nitigation is not to exceed one-fourth part of the herein mentioned.

wer of mitigation ought to be uſed with ſome con-

To compound in certain cases would make the offender a gainer by his fraud.

For if one (without proper notice) privately ſells beer or ale, either as a common brewer or and is not diſcovered until ſeveral times he ſo the amount of forty or fifty barrels, and all that ed to have when diſcovered did not exceed three arrels; the penalties in ſuch caſes alſo are fifty the copper in which he brewed, and fifty pounds eſſel uſed. But if all the penalties ſhould be mitreduced ſo low as to be ſufficient to anſwer the ty of the four or five barrels ſo found, and the the proſecution, the offender, inſtead of paying y for the offence, will not pay the ſingle duty he ave paid; ſo that the offender, inſtead of being or his fraud, will be a gainer by the tranſaction. ale holds with reſpect to malt, and many other exticles of manufacture.

ethod of mitigating a penalty is this: the juſtices to mitigate the penalty, firſt give their judgment for

Judgment muſt be given for the whole penalty.

§ 7. JUDGMENT. the whole amount of the penalty, and then they may mitigate it to a leſſer ſum.

IT is not neceſſary, in the mitigation, to mention or diſtinguiſh ſo much for the offence and ſo much for the charges, but after the juſtices have agreed what ſums to allow for the charges, the beſt way will be to add thoſe two ſums together, and make their mitigation to ſuch ſum, as both when added together do amount unto: as ſuppoſe the juſtices do intend, that the defendant ſhall pay 10l. for the offence, and 40s. for the charges, the beſt way will be to make their mitigation amount to 12l. without particularly mentioning that 10l. thereof is for the offence, and that the 40s. is for the charges; for in all caſes it is wrong to inſert in judgments more words or particulars than are neceſſary; and it is more particularly wrong in theſe caſes, becauſe the mentioning ſuch unneceſſary particulars may give a handle for cavils and diſputes[l].

—COSTS. MOST of the exciſe penal ſtatutes expreſsly authorize the juſtices to give coſts. Where they do not, the juſtices have power, in conſequence of the general law relative thereto[m].

[l] Shaw. Ex. Burn, p. 32.

[m] 18 Geo. III, c. 19. Whereas by the laws now in being, juſtices of the peace are not ſufficiently authorized, on complaints that come before them out of ſeſſions, to award coſts againſt either the perſon complaining, or the perſon againſt whom the complaint is made; it is therefore enacted, that where any complaint ſhall be made before any juſtice or juſtices, and a warrant or ſummons ſhall iſſue in conſequence thereof, it ſhall be lawful for ſuch juſtice, who ſhall have heard and determined the matter of the complaint, to award (A) ſuch coſts to be paid by either party, and in manner and form as to him ſhall ſeem meet, to the party injured: And if the perſon ſo ordered by the juſtice ſhall not forthwith pay, or give ſecurity for the ſame to the ſatisfaction of the juſtice; the ſame ſhall be levied by diſtreſs (B) And if goods and chattels of ſuch perſon cannot be found (C), the juſtices ſhall commit him (D) to the houſe of correction for the place where ſuch perſon ſhall reſide, to be kept to hard labour not exceeding one month, nor leſs than ten days, or until ſuch ſum, together with the expences attending the commitment, be firſt paid. §2.

Provided, that upon the conviction

In moſt of the exciſe ſtatutes there is a proviſion, that if perſons be proſecuted for any thing done by virtue or in purſuance of the act, the proſecutor, if he fail, muſt pay treble coſts. This is made general by ſtatute 28 Geo. III, c. 37, § 23. § 7. JUDGMENT.

VIII. In order to give effect to their decrees or ſentences, juſtices are empowered, by the ſame general ſtatute 12 Car. II. c. 24, § 45, to iſſue warrants, under their hands, for levying the ſame from the goods and chattels of the defenders. § 8. EXECUTION.

This is done by iſſuing a warrant of diſtreſs. In caſe the offender ſhall remove out of the juriſdiction, it is enacted by the 18 Geo. II, c. 26, § 13, and 5 Geo. III, c. 43, § 26, that the commiſſioners and juſtices reſpectively, within whoſe juriſdiction any perſon charged by any act concerning the duties of exciſe, or any other duties under the management of the commiſſioners of exciſe, or who hath committed any offence againſt any of the ſaid acts, ſhall be found, may ſummon, hear, adjudge, and determine, and iſſue any proceſs or warrant, in the ſame manner as before they might have done in caſe of ſuch offences committed within their juriſdiction; and if they ſhall, upon any judgment given by them, iſſue a warrant of diſtreſs, and the perſon authorized to execute the warrant ſhall make a return thereto, that no ſufficient diſtreſs can be found, it ſhall be lawful for the ſaid —DISTRESS.

if any perſon upon a penal ſtatute, where the penalty ſhall amount to or exceed the ſum of 5l. the ſaid coſts ſhall be deducted by the juſtice acording to his diſcretion, out of the penalty, ſo that the ſaid deduction ſhall not exceed one-fifth part of the penalty; and the remainder of the penalty ſhall be paid to or divided among the perſon or perſons who would have been intitled to the whole of the penalty, if this act had not been made. § 2.

And the juſtices in ſeſſions, from time to time, may lay down or alter ſuch rules and regulations concerning coſts or charges to be allowed to any perſon by virtue of this act, as to them ſhall ſeem juſt: which rules and regulations, having received the approbation and ſignature of one or more of the judges of aſſize, ſhall be binding, and not otherwiſe, on all perſons whatſoever. § 9.

§ 8. EXECUTION —DISTRESS.

commiſſioners and juſtices reſpectively, within whoſe juriſdiction the party ſhall at any time be found, againſt whom ſuch warrant ſhall have been iſſued, upon producing to them ſuch warrant, and return thereof, to commit ſuch offender to the next county gaol till ſatisfaction be made.

THE general nature of this *diſtreſs*, which is iſſued by warrant of juſtices of peace, and the length of time that the diſtreſs may be detained, have been explained already[r].

—UTENSILS, &c.

IN the 15 Car. II, c. 11, it is enacted, that all brewing utenſils, &c. in whatever hands they ſhall come, or by whatever title they may be claimed, are liable to all debts and duties of exciſe in arrear, owing by the owner thereof, and alſo ſubject to all penalties and forfeitures committed, &c. by ſuch perſons againſt the ſtatutes of exciſe, and that it ſhall be lawful to levy all debts and penalties, and uſe ſuch proceedings againſt ſuch utenſils as it might be lawful to do, in caſe the debtor or offender had been truly the owner and proprietor.

IN like manner, the utenſils of many other manufactures under the exciſe laws and regulations, are liable to all penalties, forfeitures, and arrears of duty, incurred and due from the owners, or apparent owners of them. And by ſtatute 28, Geo. III, c. 37, § 21, *all* goods in reſpect of which exciſe duty is chargeable, and materials and utenſils, are made ſpecifically liable for duties and penalties.

THE warrant therefore ought to ſpecify, to ſeize all utenſils, uſed by the defendant[s].

IF there be not a ſufficiency of goods or chattels, the ſame

[r] See V. i, p. 303, 304.

[s] Hutchefon Exciſe Laws, § 138.

ſtatute 24 Geo. II, c. 40, authorizes the juſtices to impriſon the party till ſatisfaction be made [t].

§ 8. EXECUTION —UTENSILS.

IT is material to obſerve, that before any warrant can be made to arreſt and impriſon the perſon of the defendant, there muſt be firſt a warrant to ſeize the utenſils in cuſtody of ſuch offender, and the offender's goods; and that warrant muſt be returned: All which muſt be done, before any warrant can be regularly made to arreſt and impriſon the defendant's perſon. This method ought to be obſerved, though perhaps it may be well known by, or ſufficiently proved before the juſtices, that all the utenſils and all the defendant's goods are carried off; for the law being in all caſes very tender of depriving men of their liberty, it is neceſſary that all poſſible means ſhould be uſed to levy the money on ſuch goods, before the perſon of the defendant be impriſoned. But if a warrant to ſeize the utenſils and goods be made and delivered to an officer to be executed, and if ſuch officer, having made diligent ſearch, cannot find any ſuch, then a warrant may be made to arreſt and impriſon the perſon of the defendant. But then there ought to be a

Before perſonal arreſt, there muſt be a warrant to ſeize utenſils and goods.

[t] Mr. Shaw and Mr. Barlow are of opinion, that where there are ſome goods, but not ſufficient for ſatisfying the judgment, yet thoſe goods may be applied for that purpoſe ſo far as they ſhall extend, and the defendant ſhall be impriſoned for the reſidue. But Dr. Burn obſerves, that it would be hard that the defendant, who perhaps ſatisfies nearly the whole ſum, ſhould be impriſoned as much as if he had paid nothing; and it hath been adjudged in other caſes, that a man ſhall not firſt pay part, and then be impriſoned for the reſidue, but ſhall either pay the whole, or be impriſoned for the whole. He therefore thinks the diſtinction may be this; where there is a limited time of impriſonment, as, for inſtance, three months, there the defendant ſhall not pay part, and then be impriſoned the whole three months, which would be to puniſh him both ways; but where the impriſonment is till the penalty ſhall be paid, there the payment of the penalty is the thing chiefly regarded, and the impriſonment is not intended as a puniſhment, but as a mean to compel the payment of the penalty, and if part of it is paid already, the enlargement may come the ſooner, by payment of the reſidue. Tit. Exciſe in General, p. 28.

§ 8. EXECUTION. duplicate made of ſuch warrant; becauſe the keeper of the priſon cannot regularly receive the offender without a warrant, and the officer ought alſo to have and keep a warrant for his own juſtification [u].

In matters concerning the revenue, the power of juſtices is determined by the Britiſh ſtatutes; the juſtices have no greater or other power than thoſe ſtatutes have given them; and how their ſentences are to be put in execution, is, as we have juſt now ſeen, diſtinctly ſet forth in the ſtatute 12 Car. II, c. 23, 24, and of the 15 Car. II, c. 11, by iſſuing warrants for levying the forfeiture by diſtreſs and ſale of goods, and, for want of diſtreſs, by impriſonment. But as there is no ſuch form known in the law of England as levying *nomine pœnæ* (which are not comprehended under goods and chattels), by arreſtment and furthcoming, the juſtices have no ſuch power by the laws of exciſe [x].

§ 9. REVIEW.—APPEAL from the juſtices. IX. In exciſe queſtions, the rule is, that no appeal lies to the quarter ſeſſions, unleſs it be expreſsly given by a particular ſtatute; for no appeal from them is given by 12 Car. II, c. 24. The power of appealing from the judgment of the juſtices, in the exerciſe of their exciſe juriſdiction, has been conſidered not to attach without being expreſsly given.

From the judgment of the ſub-commiſſioners.

KING CHARLES' ſtatute, as to offences committed without the limits of the exciſe office in London, veſted juriſdiction in any two juſtices; and in caſe of their neglect or refuſal, a power is given to the ſub-commiſſioners of exciſe to take cognizance of the matter. And where any one is aggrieved by a judgment of the ſub-commiſſioners of exciſe, the ſtatute expreſsly allows him to appeal to the next quarter ſeſſions [a].

[u] Shaw Ex.

[x] 26th July 1747, Caldwall againſt M'Dowall. Kilk. p. 310.

[a] § 45.

§ 9. REVIEW. —APPEAL.

As the ſtatute gives no ſuch liberty of appeal from a judgment of the juſtices, it is clear that a reliance was placed in them, which is not placed in the ſub-commiſſioners of exciſe; who indeed are not to be reſorted to at all, unleſs in the caſe of the refuſal of the juſtices. The pervading principle of the ſtatute was, on the one hand, never to truſt to the judgment of thoſe perſons who are employed in collecting the duties; but, on the other hand, to make the deciſion of the magiſtrates final, in whatever ſtage of the buſineſs it came before them. There was no jealouſy that the juſtices would be too ready to convict; and therefore the ſame precaution was not neceſſary in giving an appeal from their judgment, as from that of the ſub-commiſſioners[b].

When competent for the juſtices.

But there are two or three exciſe ſtatutes which allow an appeal from the judgment of the juſtices to the quarter ſeſſions. The firſt that did ſo is the 9 Anne, c. 11, relative to hides, ſkins, parchments, and vellum. It is given alſo from the judgment of two juſtices concerning hides[c]; concerning malt[d]; candles; ſoap; ſtarch[e]; plate licenſes[f];

[b] See Vol. I, p. 279, for the deciſion that fixed this point in Scotland.

[c] 9 Anne, c. 11, § 36; and no *certiorari* ſhall be allowed, § 47.

[d] 12 Anne, ſeſſ. 1, c. 2, § 37.

Perſons aggrieved by any judgment of the juſtices, may appeal to the next quarter ſeſſions, giving ſix days notice in writing; but if there be not ſix days between the order of the juſtices and the ſeſſions, the appeal may be at the ſecond ſeſſions. 5 Geo. II, ſt. 2, c. 16, § 3.

And the ſeſſions may award coſts to either party, to be levied by warrant of the juſtices or two of them, on the goods of the party. 12 Anne, ſeſſ. 1, c. 2, § 38.

And no certiorari ſhall be allowed, to ſet aſide any order of the juſtices. Ibid. § 37.

And all malt in cuſtody of the maker, ſhall be liable to the duties and penalties, in the ſame manner as if he were the lawful owner. Ibid. § 10.

By 6 Geo. I, c. 21, which relates to malt and the diſtillery, there is a clauſe, § 22, which enacts, that all ſeizures of ſweets, and every other forfeiture or forfeitures, which ſhall be made by virtue of that act, or any act whatever, relating to the duties of exciſe, ſhall be adjudged as preſcribed by that act, and that ſuch proceedings ſhall *not be liable to appeal.*

§ 9. REVIEW. and in queſtions relative to the diſtilleries in the highlands of Scotland [h].

A doubt aroſe, whether this general clauſe did not take away the right of appeal from the judgment of two juſtices, as to malt, hides, and vellum: For clearing this doubt, the 1 Geo. II, c. 16, § 4, declares that, by the above ſtatute, the right of appealing in thoſe caſes is not taken away.

[f] 23 Geo. II, c. 21, § 37. When any candles, &c. ſhall be ſeized as forfeited, in purſuance of this act, (except ſuch ſeizures where no perſon ſhall within twenty days after ſuch ſeizure claim the ſame, in which caſe the method of proceeding has been herein before directed), the ſame, and the ſaid ſeveral penalties and forfeitures, ſhall be proceeded upon as follows, viz. All informations for the condemnation of ſuch ſeizures, and for the penalties, if the ſame were made and incurred within the limits of the chief exciſe office in London, ſhall be heard and determined by three commiſſioners of exciſe, or by the commiſſioners of appeals, in caſe of an appeal, and not otherwiſe; and where the ſame ſhall be made and incurred out of the limits of the ſaid chief office of exciſe in London, by two or more juſtices of the peace reſiding near to the place where ſuch ſeizure ſhall be made; and either *party aggrieved by the ſaid juſtices, may appeal to the juſtices at the next quarter ſeſſions, whoſe judgment ſhall be final:* which ſaid commiſſioners and juſtices are required, upon information or complaint exhibited within three months after any ſeizure made, or penalty incurred, to ſummon the party accuſed, and the witneſſes; and upon appearance, or default of the party accuſed in not appearing, (upon proof of notice given), to proceed to the examination of the matter of fact, and of the witneſſes upon oath, and to give judgment thereon; and and to iſſue their warrant for the ſale of ſuch candles, ſoap, or ſtarch, and the packages, veſſels, cattle, and carriages, as ſhall be condemned, and for levying the pecuniary penalties by diſtreſs of the goods of the offender; and to make ſale thereof, if not redeemed within fourteen days; and for want of ſufficient diſtreſs, they may impriſon the party till ſatisfaction be made.

[g] 31 Geo. II, c. 32, § 11. All proſecutions for recovery of penalties for offences againſt this act, ſhall be heard and determined either by bill, &c. in any court of record at Weſtminſter, or in the court of exchequer in Scotland, or in ſuch manner as hereafter is directed; viz. All proſecutions for penalties for offences within the limits or juriſdiction of the chief office of exciſe in London, may be determined by three commiſſioners of exciſe in England; and in caſe of appeal, by the commiſſioners for appeals or the major part of them, whoſe judgment ſhall be final; and all proſecutions for penalties for offences in any other places in Great Britain, may be determined by two juſtices reſiding near to the place where ſuch offence ſhall be committed; and if either the informers or defendants think themſelves aggrieved by the judgments of ſuch juſtices, it ſhall be lawful for ſuch informer or defendant, to appeal

BUT no appeal in any cauſe of exciſe ſhall be admitted, till the appellant hath depoſited the ſingle duty with the commiſſioners, or ſub-commiſſioners, and given ſecurity to the commiſſioners of appeal, or juſtices of the peace, where the cauſe is to be finally adjudged, for ſuch forfeiture as was adjudged againſt him; and if upon appeal the judgment be reverſed, they ſhall reſtore the duty ſo depoſited, or ſo much thereof as ſhall be adjudged on the appeal, and the party originally proſecuting ſhall pay double coſts; but if the judgment be affirmed, the party appealing ſhall pay the like coſts to the commiſſioners [i]. § 9. REVIEW.

AND all differences and appeals about the exciſe, ſhall be heard in the proper county, and not elſewhere [k].

UPON appeals to the quarter ſeſſions, in caſes relating to

the next quarter ſeſſion for the unty or place where the penalty is curred, whoſe judgment ſhall be al: and the commiſſioners for ex- and commiſſioners of appeals, all juſtices of peace reſpectively, e, upon complaint, or information on oath, of any offence againſt this to ſummon the party accuſed; d upon his appearance or contempt, proceed to the examination of the tter; and upon proof, either by nfeſſion of the party ſummoned, or the oath of one witneſs, to give dgment, and iſſue warrants under eir hands for the levying of ſuch nalties upon the goods of ſuch per- n, and to cauſe ſale to be made of ch goods if not redeemed within urteen days, rendering to ſuch per- n the overplus; and for want of ſtreſs, to impriſon the party offend- g till ſatisfaction be made.

[h] 25 Geo. III, c. 22, § 27. All penalties and forfeitures impoſed by this act, ſhall be ſued for before any two juſtices within the county where the offence ſhall be committed, whoſe ſentence ſhall be ſubject to review only by the juſtices in their quarter ſeſſions, or before the barons of exchequer; and ſhall be ſued for by any officer of exciſe, or any member of the kirk ſeſſion in the pariſh wherein the offender lives, or by any licenſed diſtiller within the county; and the one half thereof ſhall go to the poor of the pariſh within which the offence is committed, and the other to the proſecutor, of which there ſhall be no mitigation; and all ſuch actions ſhall be commenced within ſix months after the offence committed.

[i] 15 Car. II, c. 11.

[k] Ibid. § 22.

§ 9. REVIEW—SUPREME COURTS.

the duties on malt and hides, the juſtices are directed to rehear the truth and merits of the facts in queſtion, and to reexamine the witneſſes, and thereupon finally determine; and if any defect of form ſhall be found in the proceedings before the particular juſtices, ſuch defect is to be rectified by the quarter ſeſſions [1].

THERE is this difference between a certiorari (and of courſe advocation, ſuſpenſion, and reduction) and an appeal; the latter does not lie unleſs expreſsly given, becauſe it is not a common law right; the former muſt be taken away by expreſs words, becauſe it is a common law right. In every caſe, therefore, the judgment of the juſtices and of the ſeſſions are reviewable by advocation, ſuſpenſion, reduction, unleſs the contrary be expreſsly declared.

BUT, in exciſe queſtions, the general rule is, that the judgments of the juſtices are not reviewable, if the proceedings have been regular, and conducted in manner required by law; the ſtatutes which gave them that juriſdiction declaring it to be final [m].

[1] 6 Geo. I, c. 21, § 20.

[m] 25th Jan. 1710, Mr. John Paterſon, collector of exciſe, within the ſhire of Perth, againſt ſir James Ramſay of Banff, and others. Forbes. A bond was granted for 70l. ſterling, contained in two decreets obtained by the collector of exciſe before the juſtices, for refuſing acceſs to a gauger to ſearch his cellar and ſtorehouſe; and a ſuſpenſion and reduction thereof, and of the ſaid decree, was brought upon nullities and informalities, the court of ſeſſion "conſidering that the ſentences of juſtices of peace in matters of exciſe are by ſtatute final, and not ſubject to the review of any other judicature, declined to judge whether the decreets were formal or not; but found the letters orderly proceeded, except as to the penalty, which they ſuſpended.

FINIS.

APPENDIX II.

No. I.

Nomination of Clerk, Fiſcal, and Conſtable[a].

"IN a juſtice of peace court for the diſtrict of lying within the county of held at upon the day of years. Preſent, A. B. and C. D. The court nominate and appoint D. E. to be clerk" (or fiſcal, as the caſe may be) "to the meeting of juſtices for the ſaid diſtrict, who accordingly accepted of the ſaid office, and gave his oath *de fideli adminiſtratione*.

A. B. J. P.
C. D. J. P.
D. E. Clerk, or Fiſcal."

No. II.

Ditto by an original or adjourned Meeting of the Quarter Seſſions.

AT the day of in an adjourned meeting of the quarter ſeſſion for the county of Preſent, (here inſert the juſtices)

[a] The crown appoints the principal clerk, who appoints the diſtrict clerks, and failing his doing ſo, the juſtices appoint their own clerk for the time. See Vol. i, p. 41.

The court nominate and appoint to be conſtable (or conſtables) in the ſaid county, who having accordingly accepted, were duly qualified in terms of law."

No. III.

Oath which ſhould regularly be adminiſtered to Conſtables.

" I DO ſwear, that I ſhall faithfully and truly diſcharge the office of conſtabulary within the pariſh of enduring the time appointed to me; and ſhall not for favour or reſpect, or fear of any man, forbear to do what becometh me in the ſaid office; and above all things, I ſhall regard the keeping and preſerving of the king's majeſty's peace, and ſhall at every quarter ſeſſion and meeting of juſtices, give true and due information of any breach which hath been made of his majeſty's peace, within the bounds of my commandment, and ſhall noway hide, cover, nor conceal the ſame, nor any of the proofs and evidences which I can give for the clearing and proving thereof." So help me GOD.

No. IV.

Intimation to the Perſons named to attend the Court.

" AND in order that the ſaid conſtables may ſignify their acceptance, and qualify in terms of law, ordain the ſaid perſons to attend the next meeting of quarter ſeſſion at this place, the day of to which day the quarter ſeſſion is hereby adjourned, and grant warrant" [to any perſon to be named, who may be of the conſtables already qualified] " to intimate the ſame to them, and require their attendance accordingly, as they ſhall be anſwerable."

No. V.

A Citation thereon.

" In virtue of a warrant of the adjourned meeting of the arter ſeſſion of the county of held at the y of years, I conſtable, intimate to you, that u are named one of the conſtables for the pariſh of d warn and charge you to attend an adjourned meeting the quarter ſeſſion at upon the day of xt, in order you may ſignify your acceptance of ſaid office, d qualify accordingly. This I do upon this day of years, with certification.

(Signed) Conſtable [a]."

No. VI.

rtification to the Quarter Seſſions, of the Non-attendance of the Perſons named.

" The court certifies, that A. B. and C. D. were regu-ly appointed conſtables, and cited by an officer of court attend here this day in order to qualify themſelves; not-ithſtanding whereof, they have failed to attend, and there-re this court refers the matter to the general quarter ſeſ-n of the county, that the ſaid perſons may be proceeded ainſt in terms of law."

No. VII.

Form of Procedure in the ordinary Juſtice of Peace Courts [b].

Complaint.

" Complains A. B. againſt C. D. for beating and bruiſ-ing him," (or as the caſe may be), " upon the day of

[a] A conſtable finds caution for his good behaviour.

[b] The forms relating to courts held under the ſmall debt act are given below.

or upon one or other of the days of that month, and prays redreſs from the juſtices of peace of the diſtrict of to be held at the day of for the ſum of in name of damages, to be payable to me the ſaid A. B. and to be impriſoned till payment thereof, and of the ſum of in name of expences.

A. B."

The fiſcal's concurrence, however, is always adhibited, the complaint being in name of the private party, with concurrence of A. B. procurator fiſcal of court for the public intereſt; and the concluſion for payment of a fine, beſides damages; or ſeparately, as under:

No. VIII.

Ditto, at the Inſtance of the Procurator Fiſcal.

" COMPLAINS A. B. procurator fiſcal of the juſtice of peace court for the diſtrict of for the public intereſt, againſt C. D. for beating and bruiſing E. F. &c." (as in the caſe above), and it ſhould conclude " for a fine of the ſum of to be inflicted on the ſaid C. D. to be payable to me for the pubiic intereſt, and to be impriſoned till payment thereof, and of the ſum of of expences; and to be further puniſh-d, in terror to others from committing the like in time coming."

No. IX.

Claim.

" CLAIMS A. againſt B. the ſum of being wages due to the claimant from the term of to the term of both laſt paſt, and craves decreet of the juſtices of peace for the diſtrict of at a meeting to be held by them at the day of next to come, with the ſum of in name of expences."

No. X.

Short Copy of Citation.

I A. B. conſtable, warn and charge you to ap-
before a meeting of the juſtices of peace for the diſtrict
to be held at upon the day of
to come, to anſwer in the complaint, or claim," (as the
may be), "at the inſtance of C. D. againſt you. This
upon the day of
A. B. Conſtable."

No. XI.

ort Copy of Citation to be given to each of the Witneſſes.

I A. B. conſtable, warn and charge you to ap-
before a juſtice of peace court, to be holden at
day of next to come, to bear leal and ſooth-
witneſſing, in ſo far as you know, or ſhall be aſked at
anent the complaint, or claim" (as the caſe may be)
the inſtance of A. B. againſt C. D." And in caſe he
have any writings in his cuſtody to be called for, the
on ſhould ſpecify the ſame as follows: "Bringing with
and producing before the foreſaid court, all writings in
cuſtody relative to the ſaid claim, or complaint; with
ication. This I do this day of years."

No. XII.

cution to be returned, ſubjoined to the Complaint or Claim.

I A. B. conſtable, upon the day of years,
ed and charged the above defender, per-
ly apprehended, (or by leaving a ſhort copy of citation
his wife or ſervant, within his dwelling-houſe, in or-
o be given him, becauſe I could not apprehend him
nally; or by leaving the ſame in the lock-hole of the
patent door of his dwelling-houſe, after my giving

ſix ſeveral audible knocks thereat, as uſe is, becauſe I could neither get acceſs to the houſe, nor find himſelf perſonally apprehended, as the caſe may be), to appear before a juſtice of peace meeting, to be holden at the day of next to come, to anſwer in the above claim, or complaint," (as the caſe may be), " with certification.

(Signed) Conſtable."

If witneſſes are cited, the execution will bear, " And I alſo upon the day of lawfully warned and charged to appear before the ſaid meeting of juſtices, day and place foreſaid, in order to bear leal and ſooth-faſt witneſſing in the above complaint, or claim, and that by delivering each of them a ſhort copy of citation to that effect, perſonally apprehended," (or as the caſe may be).

When any party chooſes to preſent a petition to the juſtices, it may be done in the following terms:

No. XIII.

Form of a Petition under the Act 1621, *relating to Servants refuſing to engage.*

" Unto the Honourable the Juſtices of Peace of the County of or any two or more of their number,

The Petition of A. B.

Humbly ſheweth,

That the petitioner who poſſeſſes the farm of is not in a condition to carry on his labouring, without the aid of ſervants, and having made application to ſundries to engage with him, and particularly to C. D. who has at preſent no ſettled maſter or employment, he refuſed to engage with the petitioner, although he offered him the ſum of being the regulated wages allowed by the quarter ſeſſion to ſuch ſervants; and therefore it becomes neceſſary for the petitioner to make the following application to your honours:

" May it therefore pleaſe your honours, to ordain this petition and your deliverance, to be ſerved upon the

ſaid C. D. and to grant warrant to conſtables, to bring him before you for examination; and upon the facts above ſtated being admitted or proven, to decern and ordain the ſaid C. D. to ſerve the petitioner during the terms aforeſaid; and failing thereof, to grant warrant to impriſon him within the county jail, ay and until he finds ſufficient caution acted in your honours court books, that he ſhall ſerve the petitioner as aforeſaid."

Or thus:

THAT C. D. having ſerved the petitioner, in order to y on huſbandry from the term of Martinmas laſt, and petitioner having applied to him, to renew his engage- t from the term of Whitſunday next, to the term of tinmas following, the ſaid C. D. refuſed to renew his gement; neither, ſo far as the petitioner knows, is he ıged with any other maſter, to carry on huſbandry, but ns to throw himſelf idle during the ſummer and harveſt, in r that he may get employment in bye-jobs in the coun- or intends to go out of the country during the ſeaſon, n his ſervice might be of the greateſt uſe in it. That practices are moſt pernicious to huſbandry, and will in put it out of the power of tenants to carry on their uring. That by the act of parliament 1621, c. 21, it is ined, for the reaſons therein mentioned, that it ſhall not ıwful for any hired ſervant from Martinmas to Whit- ay, to leave his maſter at the ſaid term of Whitſunday, to run looſe in that ſervice, except he be able to verify ıe juſtice of peace, or conſtable of the bounds, that he is l unto another maſter from the ſaid term of Whitſunday Iartinmas thereafter; and if it be found that he is not l to another maſter, then, and in that caſe, it is declar- that it ſhall be lawful unto his preſent maſter, to keep detain him from the ſaid term of Whitſunday unto tinmas, for payment to him of ſuch wages as he paid to before; and if he refuſe to ſerve, that the juſtice of e ſhall have power to compel him thereunto: And if aid ſervant, of the quality foreſaid, break looſe from his er, it ſhall be lawful for his maſter to take and appre- l him, whereſoever he findeth him, and preſent him unto

the conſtable or juſtice of peace, upon the ground where he ſhall be found, who ſhall have power to compel the ſervant to return unto his former maſter, if it be found that he be maſterleſs, and none otherwiſe.

" May it therefore pleaſe your honours, to grant warrant, &c. and upon the facts above ſtated being either admitted or proven, to decern and ordain the ſaid C. D. to remain in the petitioner's ſervice, at the wages of L. being that paid him for the laſt half year; and failing of his complying, to commit him to the gaol of the county, ay and until he finds caution, &c."

No. XIV.

Deliverance thereon.

Place and *date*.—" The juſtice having conſidered this petition, grants warrant to conſtables, to bring the ſaid C. D. complained upon, before me for examination." Or may grant warrant " for ſerving the petition and deliverance upon the ſaid C. D. complained upon, and ordain him to appear at the next meeting of juſtices; and may alſo grant warrant for citing witneſſes on both ſides to be examined in the matter."

No. XV.

Form of a Decree upon a Complaint.

Place and *date*.—" THE juſtices having conſidered the complaint by A. B. againſt C. D. with the execution thereof, and proof adduced, or admiſſion of the defender, *(as the caſe may be)*, find the complaint proven, and decern the defender to pay to A. B. the private complainer, the ſum in name of damages, and the ſum of of expences of proceſs. And decern and ordain him to pay the ſaid ſum within eight days from this date; and failing of his

oing ſo, grant warrant for impriſoning him in the county aol, ay and until he makes payment of the ſums above ıentioned; and grant warrant for inſtant execution by ar-ɛſtment, and for poinding, upon a charge of fifteen days, fter the ſame is duly expired, and decern."

If the action is at the inſtance of the procurator fiſcal, the ecreet will run, " Fine and amerciate C. D. the defender, n the ſum of payable to the procurator fiſcal of ourt, for the public intereſt, and expences, &c."

If the juſtices think it neceſſary to bind the defender to eep the peace, they ſhall farther " decern and ordain him within a certain ſpace] to find ſufficient caution, acted in he juſtice of peace court-books, to keep the peace for the pace of under the penalty of and grant varrant to impriſon him till he find ſuch caution."

No. XVI.

Decree upon a Claim.

" THE juſtices having conſidered the claim, anſwers, and proof adduced, or admiſſion of the defender, find the claim inſtructed, and decern the defender to pay to the claimant, he ſum of and in name of expences, and grant warrant for arreſtment and poinding," as above men-ioned.

No. XVII.

Appeal.

" I A. B. conſidering myſelf aggrieved by a judgment pro-nounced upon the day of by A. B. and C. D. wo of his majeſty's juſtices of peace for the county of in the action purſued at the inſtance of F. G. [or as he caſe may be] againſt me, in manner ſet forth in the com-plaint or action, [as the caſe may be], whereby the ſaid juſ-ices pronounced the following ſentence, [here take down

the ſentence], do therefore appeal for redreſs, to the enſuing quarter ſeſſion of the county, to be held at upon the firſt Tueſday of next to come, and that for the reaſons following [here inſert the reaſons of appeal]. This appeal I lodge in open court," (or in the clerk's hands, as the caſe may be), " offering caution, and ſerving the proſecutors with a duplicate thereof, in terms of law."

If the appeal is taken at pronouncing the judgment, there is no ſervice neceſſary. The ſervice may be done by a conſtable, ſubjoining to the inſtrument of appeal as follows: " I A. B. conſtable, ſerve you C. D. with the above inſtrument and reaſons of appeal. This I do upon this day years."

Petitions of appeal always ſtate the caſe fully, as is done in reclaiming petitions to other courts.

No. XVIII.

Bond of Caution.

" I A. S. bind and oblige me, my heirs, executors, and ſucceſſors, as cautioner and ſurety, acted in the juſtice of peace court-books of for H. I. that he ſhall anſwer, and abide by the judgment to be pronounced by the enſuing quarter ſeſſion, to be held at the firſt Tueſday of next to come, upon hearing the appeal taken by him againſt a ſentence pronounced by A. B. and C. D. two of his majeſty's juſtices of peace for the ſaid county, upon the day of laſt paſt, in the action purſued at the inſtance of F. G. againſt him; and alſo that the ſaid H. I. ſhall make payment to the ſaid F. G. of whatever expences the ſaid quarter ſeſſion ſhall modify in caſe of wrongous appellation; and the ſaid H. I. binds and obliges him, his heirs and ſucceſſors, for his cautioner's relief in the premiſes. And we conſent to the regiſtration hereof in the ſaid juſtice of peace court-books, or others competent, that letters of horning, and all other execution neceſſary, may paſs hereon in form as effeirs; and for that effect, we conſtitute our procurators, &c. In witneſs whereof, theſe preſents

written upon this and the preceding page by L. M.) are ſubſcribed by us at the day of before theſe witneſſes."

No. XIX.

Copy of Arreſtment.

"In virtue of a decreet pronounced by his majeſty's juſtices of peace for the county of upon the day of containing warrant of arreſtment, I A. B. conſtable, fence and arreſt in the hands of you the ſum of addebted and owing by you to the ſaid , and I, in like manner, arreſt all goods and effects whatſoever, in your cuſtody, pertaining to the ſaid to remain under ſure fence and arreſtment, till caution is found for the ſums decerned for by ſaid decreet. This I do, upon this day of . (Signed) conſtable."

No. XX.

Charge.

"In virtue of a decreet and ſentence pronounced by the juſtices of peace, for the county of , dated the day of in the complaint or claim (as the caſe may be) at the inſtance of A. B. purſuer, againſt C. D. defender, I conſtable, command and charge you, the ſaid C. D. to make payment to the ſaid A. B. purſuer, of the ſums following, [here mention the ſums decerned for], and that within fifteen days next after this my charge, in terms of the ſaid decreet in all points, with certification. This I do, this day of years. A. B. conſtable."

No. XXI.

Form of an Execution to be returned on the back of the ſaid Decree.

"UPON the day of I conſtable, in virtue of the within decree, commanded and charged the defender within mentioned, to make payment to the purſuer of the ſums of money within expreſſed, and that within the ſpace, and under the pain therein mentioned. This I did, by giving a ſhort copy of charge, ſigned by me, to the ſaid A. B. defender, perſonally apprehended, (or as the caſe may be), which copy of charge did bear the date hereof, and of ſaid decreet in all points. A. B. conſtable."

No. XXII.

Oath to Birlymen.

"YOU ſwear that you will execute the buſineſs of appriſers, now committed to you, according to the beſt of your ſkill and ability."

No. XXIII.

Return of an Execution.

"UPON the day of years, I conſtable, by virtue of a decreet and warrant of poinding, at the inſtance of A. againſt B. dated the day of laſt paſt, proceeded to the dwelling houſe of the ſaid B. and to his poſſeſſion of in the ſaid county, and afterwards to the market town, or borough of regality of and after reading of the ſaid decreet, execution of charge, and making public proclamation by three ſeveral oyeſſes, I apprehended the goods and gear after mentioned, pertaining to the

id B. (here take in the goods pointed) and I adduced
and to be apprifers, to whom I adminiſtered
e oath of fidelity; and they having ſworn the ſaid oath,
id taken inſpection of the goods and ſamples, valued the
me at the prices after mentioned, (here mention the prices);
id I made three ſeveral times offer back of the ſaid goods
the ſaid B. or to any perſon in his name, who would com-
ar and make payment to the ſaid A. of the particular ſums
r which the ſame were compriſed; and in regard none
mpeared for that effect, or to pretend right to the ſaid
ods, I, by virtue of the ſaid warrant of pointing, adjudg-
l, decerned and declared the ſame to belong to the ſaid B.
id delivered the ſame to him in manner following, viz.
e ſaid horſes or cows by the ear, and the ſaid moveables,
delivering each of every kind as a ſymbol for the whole,
uſe is, and that in payment and ſatisfaction (or in part
yment, as the caſe may be) of the debt contained in the
arrant of pointing, with my fee correſponding thereto,
hich in reſpect the ſaid A. has made ſatisfaction to me for
e ſame, I hereby aſſign and diſpone to him for ever; and I
ft upon the ground, where the ſaid goods were pointed, an
act note and liſt of the ſame, and prices thereof. This I
d, conform to the ſaid warrant of pointing in all points,
fore theſe witneſſes ."

In caſe the conſtable cannot complete the pointing, by
aſon of ſhut doors, he is to return an execution, beginning
in the laſt-mentioned, and then proceeds thus: "And
ving gone to the office and dwelling houſes of the ſaid de-
nder, in order to point in terms of the ſaid decreet, I was
evented from proceeding, by reaſon of lockfaſt doors. This
certify, in preſence of and witneſſes."—
nd the ſame is to be ſigned by the conſtable and witneſſes.

Hereupon, the pointer may apply to the court of juſ-
tices by petition, in the following terms:

No. XXIV.

Petition in caſe of Lock-faſt Doors.

" Unto the Honourable, &c.

" The Petition of &c.

" Humbly ſheweth,

" THAT the petitioner having, upon the day of laſt, obtained before your honours decreet and ſentence at the petitioner's inſtance, againſt A. B. finding him liable in the ſum of as damages and expences, or decerning and ordaining him to pay the ſum of as damages and expences (as the caſe may be) and containing warrant of poinding, upon a charge of fifteen days, as therein mentioned: and having accordingly charged the ſaid A. B. to make payment in terms of ſaid decreet, and the ſaid A. B. having failed to do ſo, after the time limited in the ſaid charge was elapſed, the petitioner employed conſtable, to poind the effects of the ſaid A. B. in terms of the decreet and charge given, but was prevented from executing the ſaid poinding, by reaſon of ſticked and lockfaſt doors, as appears from the execution under the hands of the ſaid conſtable and witneſſes therein inſert, herewith produced, which renders the preſent application neceſſary.

" May it therefore pleaſe your honours, to grant warrant to your conſtables, to break open the ſaid doors, and uſe the king's keys thereto, in order to enable the petitioner to complete the ſaid poinding."

No. XXV.

Deliverance.

Place and *date*.—" THE juſtices having conſidered the foregoing petition and execution therewith produced, grant war-

rant to conſtables, to break open the doors of the dwelling and office houſes belonging to the ſaid ſo as the poinding may be proceeding in, in terms of law."

No. XXVI.

Execution in caſe of deforcing.

"UPON the day of years, I conſtable, in virtue of a decreet and ſentence pronounced by the juſtice of peace for the county of ," [here mention the date of the decreet, parties concerned, and ſums decerned for], "proceeded with two appriſers and two witneſſes after mentioned, to poind the effects of the ſaid defender, and having the ſaid warrant in my hands, and after open proclamation and public reading," [here narrate the ſteps of procedure, and the manner of the deforcement, then add] "and thereupon the ſaid purſuer, or A. B. as attorney for him (as the caſe may be) proteſted, that the ſaid was guilty of deforcement, and ſhould be liable to him, not only for payment of ſaid ſums, but alſo for all damages and expences, and ſhould be further liable in the pains of law. Theſe things were ſo done betwixt the hours of and of the day, month, and year aforeſaid, in preſence of and witneſſes ſpecially called and required to the premiſes."

No. XXVII.

Execution, if the Goods are claimed by a third Party.

"BUT was prevented from compleating the poinding, by the appearance of who claimed (here narrate the goods claimed), and who made oath before me, that the ſame were his property: In witneſs whereof, I and the witneſſes have ſubſcribed theſe preſents."

No. XXVIII.

Warrant for Diſtreſs.

" THE juſtices having conſidered the complaint, &c. FIND the complaint proven (in whole or in part, as the caſe may be), THEREFORE FINE and AMERCIATE the defender in the ſum of L. ſterling, and grant warrant to the conſtables of court, and other executors of the law, to levy from the ſaid C. the ſaid ſum of ſterling, and that by diſtreſs and ſale of his readieſt goods and gear, (rendering to him the overplus, if any be), and to be applied as directed by the acts of parliament libelled on; and for that end, to make houſes, locks, and gates open and patent, and to uſe his majeſty's keys for that effect."

No. XXIX.

Execution.

" UPON the day of years, I A. B. conſtable, by virtue of the juſtices of the peace of the county of their warrant to levy by diſtreſs and ſale, dated the day of proceeding upon a complaint at the inſtance of C. procurator fiſcal of court for the public intereſt, againſt D. reſiding in paſſed with the witneſſes after named, to the dwelling-place of the ſaid D. and did aſk and demand of him payment of the ſum of as penalty forfeited by him, as contained in ſaid warrant; which demand he refuſed to comply with; therefore I, by virtue of ſaid warrant, did then, and there, after my crying three ſeveral oyeſſes, making open proclamation and public reading thereof, in his majeſty's name and authority, and in name and authority of ſaid juſtices, poinded by diſtreſs (here inſert the goods) belonging to the ſaid D. in payment, (or *pro tanto*, as the caſe may be) of the ſums contained in ſaid warrant. Thereafter I made three ſeveral offers back of the

d goods to the ſaid D. or to any other perſon or perſons ho ſhould compear in his name, or for his behoof, and pay e ſaid penalty, and that they ſhould have the ſaid goods turned; but none compearing for that effect, I carried off e ſame, to be diſpoſed in terms of ſaid warrant; and this lid after the form and tenor of ſaid warrant in all points, d I delivered to the ſaid D." (or his ſervant, within his relling-houſe, as the caſe may be) " a juſt note ſigned by ', of what I had ſo done, and which note did mention, at if he did not immediately relieve the ſaid goods, by pay- nt of ſaid penalty, the ſame would be rouped and ſold for yment thereof; and which note contained the date hereof d the date of ſaid warrant, and the witneſſes names who re preſent thereat," viz. (here mention the witneſſes names d deſignations, who and the conſtable are to ſign the ne).

The ſaid Note ſhould be in the following terms:

" NOTE of goods, the property of D. levied by diſtreſs me A. B. conſtable, in preſence of G. F. and I. K. wit- ſſes, upon the day of years, in virtue of a rrant of the juſtices of peace for the county of ted the day of years, proceeding upon the mplaint of A. C. procurator of court, for the public inter- , againſt the ſaid C. viz." (here inſert the goods) " which ods, if not immediately relieved by the ſaid A. by pay- nt of the ſum of penalty contained in ſaid war- nt, will be rouped and ſold for payment thereof, in terms ſaid warrant, and the overplus, if any be, returned to the d D. which note I now deliver to the ſaid D. his ſervant, thin his dwelling-houſe, or leave upon the lands," (as the ſe may be). " This I do in preſence of ſaid witneſſes,

A. B. Conſtable."

No. XXX.

Form of a Petition for Lawburrows.

" THAT the petitioner has juſt cauſe to dread harm to himſelf, family, and effects, from , he having threatened to maltreat the petitioner," (or as the caſe may be), " as to which the petitioner is ready to make oath.

" May it therefore pleaſe your honours, to take the petitioner's oath on the facts above ſtated, and thereafter to grant warrant to your conſtables, to ſearch for, ſeize, and apprehend, the perſon of the ſaid complained upon, and to commit him priſoner within the tolbooth of therein to remain, ay and until he finds ſufficient caution in lawburrows acted in the juſtice of peace court-books, that he ſhall harmleſs and ſkaithleſs keep the petitioner, his family and effects, in time coming, under ſuch penalty as your honours ſhall be pleaſed to modify.

According to juſtice," &c.

No. XXXI.

Oath.

Place and *Date*.—" COMPEARED the petitioner; who being ſolemnly ſworn, depones, that he dreads bodily harm, injury, and oppreſſion, from the within-deſigned : And this is truth, as he ſhall anſwer to God."

No. XXXII.

Interlocutor.

IE. juſtice having conſidered the petition, and above. ants warrant to the conſtables of court, to intimate petition, deliverance thereon, oath above emitted, interlocutor, to the ſaid complained upon; ains him, within 48 hours after intimation, to find t caution acted in the juſtice of peace court-books of that he ſhall keep the above petitioner, his irns, and haill dependents, harmleſs and ſkaithleſs in dies, lands, and goods, in all time coming, under the of ſterling; and failing of his doing ſo, and e being certified by the clerk of court, grants warrant ables to ſeek, ſearch for, ſeize and apprehend, the f the within-deſigned , and commit him to the tolbooth of , therein to remain, ay il he finds ſuch caution; requiring the magiſtrates and keepers of their jail, to receive, detain, and li- im accordingly."

No. XXXIII.

Bond.

.. B. as cautioner and ſurety acted in the juſtice of urt books of the county of , for C. D. d oblige myſelf, my heirs, executors, and ſucceſſ- t C. D. ſhall harmleſs and ſkaithleſs keep E. F. his irns, and haill dependents, in their bodies, lands, ds, and good name and reputation in all time and that under the penalty of ſterling, agree- ſentence of lawburrows pronounced upon the by A. B. one of his majeſty's juſtices of peace aid county; and I conſent to the regiſtration hereof aid juſtice of peace court books, that all diligence may paſs hereon in form as effeirs; and for that conſtitute my procurators," &c. &c.

No. XXXIV.

Certificate.

" I A. B. juſtice of peace clerk for the diſtrict of do hereby certify, that C. D. has lodged with me a ſufficient bond of caution in lawburrows, in terms of the judgment pronounced by E. F. one of his majeſty's juſtices of peace for the county of , upon the day of , as witneſs my hand, at the day of ."

No. XXXV.

Petition by Procurator Fiſcal.

" THAT the petitioner has received information, and has reaſon to believe, that A. B. and C. D. bear ſuch malice and reſentment to each other, from which there is every appearance of their being guilty of a breach of the peace; in ſo far as" [here mention the ſpecial information given, and add] " which renders it neceſſary for the petitioner to make the following application:

" May it therefore pleaſe your honours, to grant warrant to bring the ſaid A. B. and C. D. before you for examination; and unleſs they declare upon their conſcience, that they bear no hatred, ill-will, or reſentment againſt each other, to ordain them to find caution in lawburrows, in common form."

No. XXXVI.

Order thereon.

Place and *Date.*—" THE juſtice having reſumed conſideration of the foregoing petition and deliverance, and having

taken the examination of the ſaid perſons on a paper apart, —in reſpect they declined to declare upon their conſcience, in terms of the prayer of the ſaid petition, grants warrant to conſtables, with proper aſſiſtants, to commit them priſoners within the tolbooth of , therein to remain till they find ſufficient caution acted in the juſtice of peace court books, that they will keep his majeſty's peace for the ſpace of years, and that under the penalty of ſterling, or otherwiſe emit ſuch declaration as above alluded to; requiring hereby the magiſtrates of , or keepers of their jail, to detain and liberate them accordingly."

No. XXXVII.

Form of a Petition upon a Criminal Information given to the Procurator Fiſcal.

"THAT theft (or as the caſe may be) is a crime of a heinous nature, and ſeverely puniſhable; yet true it is, and of verity, that A. B. is guilty, actor, art and part, of the foreſaid crime, in ſo far as, upon the day of , or upon one or other of the days or nights of that month, or of the month of immediately preceding, or of immediately following, the ſaid A. B. theftuouſly ſtole a cow, the property of C. D. from the bounds of , which was afterwards found in the cuſtody of the ſaid A. B. (or as the caſe may be); at leaſt, time and place foreſaid, the ſaid cow was ſtolen, and the ſaid A. B. is guilty, actor, art and part, of the foreſaid theft: Wherefore the petitioner is bound in duty to make the following application to your honours:

"May it therefore pleaſe your honours, to grant warrant to your conſtables, with proper aſſiſtants, to ſearch for, ſeize, and apprehend the perſon of the ſaid A. B. wherever he can be found within this county; and being ſo apprehended, to commit him priſoner to the tolbooth of , therein to remain till he is tried for the crime above mentioned, or be otherwiſe liberated in due courſe of law."

No. XXXVIII.

Deliverance thereon.

"THE juſtice having conſidered the foregoing petition, before anſwer, grants warrant to conſtables, with proper aſſiſtants, to ſearch for, ſeize, and apprehend the perſon of the ſaid A. B. complained of; and to bring him before me, or any other of his majeſty's juſtices of peace, for examination, anent the facts ſtated in the petition.

No. XXXIX.

Declaration taken down.

"At the day of years, in preſence of one of his majeſty's juſtices of the peace for the county of

"COMPEARED A. B. married man, aged (or as the caſe may be) who being judicially examined and interrogate, declares that" [here take down his declaration, anent the crime charged againſt him, and conclude with theſe words]: "All which he declares to be truth, and that he cannot write, (as the caſe may be). This declaration, conſiſting of this and the preceding pages, is freely and voluntarily emitted by the declarant; and the ſame being read over and explained to him in the Gaelic language," (if he does not underſtand Engliſh), "he adheres thereto, in preſence of C. D. and E. F. both indwellers in

C. D. witneſs.

E. F. witneſs.

A. B. J. P."

No. XL.

Prayer for Citation of Witneſſes.

THE petitioner underſtanding that" (here mention the :s of the witneſſes), " will be neceſſary witneſſes for in- ting the charge ſtated in the petition; therefore craves your honours may grant warrant for citing the perſons e mentioned, in order to be examined, as in a precogni- " And then the juſtice may ſubjoin the following de- ance:

No. XLI.

Deliverance thereon.

THE juſtice having conſidered the foregoing repreſenta- , grants warrant for citing the perſons above mentioned, rder to be examined, as in a precognition, anent the crime ged in the petition. At the day of ."

No. XLII.

Short Copy of Citation given the Witneſſes.

' THAT they are to appear in order to be examined, as in recognition, anent the crime of theft, charged againſt A. by the procurator fiſcal."

No. XLIII.

Deliverance.

' *Place* and *date*.—THE juſtices having conſidered the fore- ng petition, declaration of A. B. complained upon, and

having examined ſundry witneſſes, as in a precognition, anent the crime charged (or as the caſe may be) grants warrant to conſtables, with proper aſſiſtants, to ſearch for, ſeize and apprehend the perſon of the ſaid A. B. wherever he can be found within this county; and being ſo apprehended, to commit him priſoner to the tolbooth of therein to remain, till he is tried for the crime charged in this petition, or be otherwiſe liberate in due courſe of law; requiring hereby the magiſtrates of , and keepers of their tolbooth, to ſecure and detain him accordingly; for all which, this ſhall be a ſufficient warrant."

No. XLIV.

Form of a Petition by a Perſon in Cuſtody, or threatened to be apprehended, to be liberate upon Bail.

"THAT the petitioner is apprehended, (or threatened to be apprehended), in virtue of a warrant granted by your honours for the crime of theft, alleged to be committed by him, as is more particularly ſet forth in the petition and warrant againſt him, of which crime the petitioner is innocent, and is willing to find caution to ſtand trial for the ſaid crime, at any time within the ſpace of ſix months, under ſuch penalty as your honours may be pleaſed to modify.

"May it therefore pleaſe your honours, to conſider the premiſes, and to find the crime charged againſt the petitioner bailable; and, upon his finding ſufficient caution and ſurety, acted in the juſtice of peace court books, for the ſhire of , under ſuch penalty as your honours may be pleaſed to modify, that he will ſtand trial for the ſaid crime, at any time within the ſpace of ſix months, from the date of the bail bond, to grant warrant for ſetting the petitioner at liberty."

Upon which the juſtice muſt, within twenty-four after the petition is preſented to him, grant a deliverance, either

finding the crime bailable or not, (under the penalty of his being liable in wrongous impriſonment, upon the ſt. 1701); which deliverance may be of the following tenor:

No. XLV.

Deliverance thereon.

Place and *date.*—"THE juſtice having conſidered the foregoing petition, finds the crime with which the petitioner is charged bailable; admits him to bail accordingly; and upon his finding ſufficient caution and ſurety acted in the juſtice of peace court books for the county of , that he ſhall appear, and ſtand trial for the ſaid crime, at any time within the ſpace of ſix months from the date of the bail bond, under the penalty of hundred merks Scots, grants warrant to the magiſtrates of , and keepers of their tolbooth, (or as the caſe may be), to ſet the petitioner at liberty."

No. XLVI.

Bond.

"I bind and oblige myſelf, my heirs, executors, and ſucceſſors, as cautioner and ſurety acted in the juſtice of peace court books of the ſhire of for A. B.: that is to ſay, that the ſaid A. B. ſhall appear and ſtand trial for the crime of theft, with which he at preſent ſtands charged, at any time within the ſpace of ſix months from this date, under the penalty of hundred merks Scots, all in terms of, and conform to an interlocutor pronounced by E. one of his majeſty's juſtices of the peace for the county of upon the date hereof, on a petition preſented to him by the ſaid A. B.; and I the ſaid A. B. not only bind and oblige myſelf to the foreſaid effect, but alſo to relieve my cautioner of his above engagement for me in the premiſes; and both

principal and cautioner conſent to the regiſtration hereof in the ſaid juſtice of peace court books, or others competent, that all execution needful may paſs hereon in form as effeirs; and thereto, we conſtitute," &c. &c.

No. XLVII.

Application for Letters of Intimation.

"THAT the petitioner is incarcerated for the crime of theft, in virtue of a warrant granted by your honours on the day of , proceeding upon the petition of , as appears by the double ſerved on the petitioner, herewith produced, of which crime the petitioner is innocent; but as, from his poverty, and want of friends, he cannot find bail, the petitioner is under the neceſſity of making the following application to your honours, in terms of the ſtatute 1701.

"May it therefore pleaſe your honours, to grant warrant for letters of intimation at the petitioner's inſtance againſt the procurator fiſcal, (or party concerned, as the caſe may be), for fixing a diet for the petitioner's trial within ſixty days, in terms of the ſaid act of parliament."

No. XLVIII.

Deliverance.

"HAVING conſidered this petition, grants warrant for letters of intimation at the petitioner's inſtance againſt the procurator fiſcal of court, (or as the caſe may be), for fixing a diet for the petitioner's trial within ſixty days, in terms of, and under the certification contained in the act of parliament."

No. XLIX.

A Copy of the Letters of Intimation follows.

" We, his majeſty's juſtices of peace for the county of , to our conſtables, ſpecially conſtitute, greeting: whereas, by petition given in and preſented to A, B. one of our number, by C. D. priſoner in the tolbooth of , humbly ſhewing, that (here take in the petition till the prayer thereof, and then ſay) and therefore craving it might pleaſe us to grant warrant for letters of intimation for charging our procurator fiſcal, (or, as the caſe may be, the party appearing by the warrant to be concerned), to fix a diet for the petitioner's trial, within ſixty days next after the intimation, in the terms and under the certifications contained in the ſaid act, as the ſaid petition bears: which petition, with a double of the warrant of commitment, ſigned by the keeper of the priſon, therewith produced, being read and conſidered by the ſaid A. B. one of our number, he, by his deliverance thereon, ordained theſe our letters to be directed thereon, in manner under written. Our will is herefore, and we charge you ſtrictly, and command, that incontinent theſe our letters ſeen, ye paſs, and in his majeſty's name and authority, and ours, make due and lawful intimation to our procurator fiſcal, (or as the caſe may be), to fix a diet for the ſaid C. D. his trial, within ſixty days next after the intimation, in the terms, and under the certifications contained in the act of parliament above mentioned. According to juſtice; as ye will anſwer to us thereupon: To which to do, &c. Given under the hand of the clerk of court, at the day of years.

C. C. clk."

No. L.

Warrant by a Juſtice, for tranſmitting a Vagrant to the next Diſtrict.

"At the day of years: Whereas A. B. conſtable for the diſtrict of , of the county of , having apprehended a perſon calling himſelf C. D. a vagrant, and having brought him this day before me, one of his majeſty's juſtices of peace for ſaid county, and as upon a declaration emitted by him before me, it appears that the ſaid C. D. is a vagrant, and that his laſt ſettlement was in , theſe are therefore granting warrant to conſtable, to eſcort the ſaid C. D. to the next diſtrict, being that of , and to deliver him to a conſtable of ſaid diſtrict, who is hereby enjoined to tranſmit him, and deliver him to a conſtable of the next adjacent diſtrict thereto, and ſo forth, till he is carried to the bounds of this county, with certification."

In caſe of ſuſpicious articles found in the cuſtody of vagrants, warrant of commitment may be granted againſt them in the following terms:

"WHEREAS, &c. and as upon his examination before me, there was found in his cuſtody the following articles, (here take in their names), and as I have reaſon to believe that the ſaid articles were not honeſtly come by, theſe are therefore granting warrant, &c. therein to remain, till it is diſcovered to whom the ſaid articles belong, having herewith tranſmitted the ſaid articles under a ſealed cover, (or as the caſe may be), to D. E. principal juſtice of peace clerk, who is hereby required to cauſe advertiſe theſe articles in the Edinburgh newſpapers, and in ſuch other places as he thinks proper, and to lay any diſcovery to be made before the juſtices in quarter ſeſſion, in order that they may further diſpoſe of the ſaid C. D. vagrant as they think proper."

No. LI.

Styles relative to the Small Debt Act.

1, *Libel.*

" Unto the honourable his Majeſty's Juſtices of the Peace, of the ſhire of :

" Complains,

" THAT where the perſon or perſons after named and de- gned, juſtly addebted, reſting and owing the com- ainer the ſum or ſums of money after mentioned, viz. which refuſe to pay, unleſs compelled. There- re the ſaid defender ought and ſhould be decerned and dained to make payment to the complainer of the foreſaid m with expences."

2, *Warrant to be ſigned by the Clerk.*

Place and *date.*—" THE clerk of the peace for the ſhire of grants warrant to the conſtables of court for ſum- oning the defender to compear before the juſtices of the ace for the ſaid ſhire, at upon the day of the hour of cauſe, to anſwer at the inſtance of the com- ainer, and, along with the citation, to deliver to the de- nder a full copy of the account purſued for, document of bt, or ſtate of the demand, with the names of the wit- ſſes, or other means of proof; as alſo, grants warrant for ting witneſſes for either party to compear at ſame place d date, to give evidence in the ſaid matter."

3, *Officer's Execution.*

" UPON the day of years, I conſta- e, by virtue of the foreſaid warrant, lawfully ſummoned, arned, and charged the before deſigned to com- ar before his majeſty's juſtices of the peace, within the upon the day of in the hour of cauſe,

to anſwer at the inſtance of the alſo before deſigned complainer, with certification. This I did, by delivering a full copy of the above complaint and warrant, with a ſhort copy of citation thereto ſubjoined, and to the ſaid defender as marked on the margin oppoſite to name, which is alſo ſubſcribed by me,

4, *Summons filled up by the Officer, and delivered by him to the Defender, or at his houſe.*

" Unto the honourable his Majeſty's Juſtices of the Peace, of the ſhire of :

" Complains,

" THAT where the perſon after named and deſigned juſtly addebted, reſting and owing the complainer the ſum of money after mentioned, viz. which refuſe to pay unleſs compelled. Therefore, the ſaid defender ought and ſhould be decerned and ordained to make payment to the complainer of the foreſaid ſum with expences."

5, *Copy of Clerk's Warrant to Summon.*

Place and *date*.—" THE clerk of the peace for the ſhire of grants warrant to the conſtables of court for ſummoning the defender to compear before the juſtices of the peace for the ſaid ſhire, at upon the day of in the hour of cauſe, to anſwer at the inſtance of the complainer and along with the citation, to deliver to the defender a full copy of the account purſued for, document of debt, or ſtate of the demand, with the names of the witneſſes, or other means of proof; as alſo grants warrant for citing witneſſes, for either party to compear at ſame place and date, to give evidence in ſaid matter."

6, *Officer's Citation.*

" I conſtable, by virtue of the foreſaid warrant, lawfully ſummon, warn, and charge you, the before deſigned to compear before his majeſty's juſtices of the peace, within the upon the day of at

eleven o'clock forenoon, to anſwer at the inſtance of the alſo before deſigned complainer, with certification. This I do, upon the day of years."

[To be ſigned by Officer.]

7, *Pro confeſſo or de novo Execution.*

"UPON the day of one thouſand eight hundred and years, I conſtable, paſt and lawfully ſummoned, warned, and charged to compear before his majeſty's juſtices of the peace for the ſhire of at upon the day of years, in the hour of cauſe, to anſwer at the inſtance of A. B. reſiding in and that *pro confeſſo*, with certification. This I did, by delivering a juſt copy of citation, ſigned by me, to the ſaid

8, *Summons de novo, Defenders not having been ſummoned perſonally firſt time.*

"I conſtable, ſummon, warn, and charge you, A. B. reſiding in , and that *pro confeſſo*, to compear before his majeſty's juſtices of the peace for the ſhire of , upon the day of years, in the hour of cauſe, to anſwer at the inſtance of with certification, by me

9, *Execution againſt Witneſſes.*

"UPON the day of one thouſand eight hundred and years, I conſtable, paſt and lawfully ſummoned, warned, and charged to compear before his majeſty's juſtices of the peace for the ſhire of , at upon the day of years, in the hour of cauſe, to anſwer at the inſtance of, and bear witneſs for the defender in the cauſe A. B. againſt C. D. with certification. This I did, by delivering a juſt copy of citation, ſigned by me, to the ſaid

10, *Summons to Witneſſes.*

"I conſtable, ſummon, warn, and charge you as a witneſs, to compear before his majeſty's

juſtices of the peace for the ſhire of , upon the day of years, in the hour of cauſe, to anſwer in the cauſe at the inſtance of with certification, by me

11, *Summons of Re-hearing, Defender having conſigned the Money.*

" I conſtable, ſummon, warn, and charge you to compear before his majeſty's juſtices of the peace for the ſhire of , upon the day of years, in the hour of cauſe, to anſwer in the cauſe at your inſtance againſt A. B. the defender having conſigned the ſums decerned for with certification, by me

12, *Execution of Rehearing, Defender having conſigned the Money in Diſpute.*

" UPON the day of one thouſand eight hundred and years, I conſtable, paſt and lawfully ſummoned, warned, and charged . . . . to compear before his majeſty's juſtices of the peace for the ſhire of at upon the day of years, in the hour of cauſe, to anſwer in the cauſe at your inſtance againſt A. B. he having conſigned the ſums decerned for to have the cauſe reheard; with certification. This I did, by delivering a juſt copy of citation, ſigned by me, to the ſaid

13, *Summons of Re-hearing, the Purſuer having conſigned Two Shillings and Sixpence to have the Cauſe reheard.*

" I conſtable, ſummon, warn, and charge you to compear before his majeſty's juſtices of the peace for the ſhire of , upon the day of 180 years, in the hour of cauſe, to anſwer at the inſtance of with certification by me,

14, *Execution of Rehearing, the Purſuer having conſigned Two Shillings and Sixpence to have the Cauſe reheard.*

" UPON the day of one thouſand eight hundred and years, I conſtable, paſt and lawfully ſummoned, warned, and charged to compear be-

fore his majeſty's juſtices of the peace for the ſhire of upon the day of years, in the hour of cauſe, to anſwer at the inſtance of A. B. he having conſigned 2s. 6d. in terms of act, that the cauſe may be heard, with certification. This I did, by delivering a juſt copy of citation, ſigned by me me, to the ſaid

15, Where Purſuer conſigns Two Shillings and Sixpence, in terms of Act, to get the Cauſe reheard.

"I conſtable, ſummon, warn, and charge you to compear before his majeſty's juſtices of the peace for the ſhire of upon the day of years, in the hour of cauſe, to anſwer at the inſtance of A. B. reſiding in Edinburgh, he having conſigned 2s. 6d. to get the cauſe reheard, in terms of act; with certification, by me

16, Form of a Warrant or Decreet.

"At the day of one thouſand eight hundred and The which day his majeſty's juſtices of peace found, and hereby find, the perſon after named and deſigned, liable to in the ſums of money after mentioned, viz. And decerned and ordained, and hereby decern and ordain, inſtant execution by arreſtment, and alſo by poinding or impriſonment, after a of ſix free days, to paſs hereon in form, as effeirs.
Extracted by

17, Charge of Payment.

"I conſtable by virtue of the principal decreet, of which the above is a juſt copy, in his majeſty's name and authority, and in name and authority of the ſaid juſtices, awfully command and charge you, the before deſigned to make payment to the ſaid of the foreſaid ſums of money, and that within the ſpace of ſix free days from the date hereof, under the pains of poinding and impriſonment, &c. as contained in the ſaid decreet. This I do upon the day of one thouſand eight hundred and years,

18, *Schedule of Poinding left by Officers with Defender, on poinding his Goods.*

" I conſtable, by virtue of a warrant of his majeſty's juſtices of the peace for the ſhire of , dated the day of years, at the inſtance of for not payment of ſterling, with of expence of plea; in his majeſty's name and authority, and in name and authority of the ſaid juſtices, I apprehended and poinded the goods following, for payment of the ſaid debt, viz. and ordains the foreſaid goods, and gear, to be carried to the market croſs of , and there to be rouped and ſold for not payment of the ſaid warrant, and according to act of parliament. This I did upon the day of years, before theſe witneſſes

No. LII.

Order of the Juſtice upon the Overſeers of the Poor, to pay the Award for apprehending Vagrants.

" To the Overſeers of the Poor of the Pariſh of A. in the County of B.

" WHEREAS it duly appears to me C. D. Eſq. one of his majeſty's juſtices of peace for the county of B. that E. F. in the pariſh of A. in the ſaid county, an idle and diſorderly perſon did, on the day of , go about from door to door, (or place himſelf in the ſtreets, highways, and paſſages) in the ſaid pariſh, to beg and gather alms there, and was within ſaid pariſh apprehended by G. H. an inhabitant therein, and was brought by him before me, in order to be dealt with according to law. I do hereby order you, or one or other of you, to pay to the ſaid G. H. the ſum of ſterling on demand, as a reward for apprehending the ſaid E. F. he producing and delivering to you this order, and giving to you a receipt for the ſaid ſum. Given under my hand and ſeal at I. in the ſaid county, the day of years."

No. LIII.

Warrant for Commitment of a Vagrant to the Houſe of Correction.

" To the Conſtable of A. in the County of B. and to the Keeper of the Houſe of Correction in the ſaid County.

" Forasmuchas E. F. late of the county of B. a rogue and vagabond, is duly convicted before me C. D. Eſq. one of his majeſty's juſtices of the peace for the county of B. in ſo far as he the ſaid E. F. did this day wander abroad, and beg in the ſaid pariſh of A. in the aforeſaid county of B.; theſe are therefore to command you, the ſaid conſtable, to carry the ſaid E. F. to the ſaid houſe of correction, and deliver him to the keeper thereof, together with this warrant. And I do hereby ſtrictly command you, the ſaid keeper, to receive the ſaid E. F. into your cuſtody in the ſaid houſe of correction, and him therein ſafely to keep until the next general quarter ſeſſions of the peace to be holden for the ſaid county of B. and that you cauſe him to be brought there, together with this precept. Given under my hand and ſeal at I. the day of years."

No. LIV.

Vagrant Paſs to Scotland.

" To the Conſtables of A. in the County of B. and alſo to all Conſtables and other Officers whom it may concern, to receive and convey; and to all Conſtables, and other Officers, within that part of Great Britain called Scotland, whom it may concern, to receive and obey.

" Whereas E. F. was apprehended in the town of A. in the county of B. as a rogue and vagabond; and, upon examination of the ſaid E. F. taken before me C. D. Eſq.

one of his majeſty's juſtices of peace, in and for the ſaid county of B. upon oath, (which examination is hereunto annexed), it doth appear that his lawful place of reſidence is in that part of Great Britain called Scotland; theſe are therefore to require you, the ſaid conſtable of A. in the county of B. to convey the ſaid E. F. to the town of K. in the county of L. that being the firſt town in the next precinct through which he ought to paſs, in the direct way to that part of Great Britain called Scotland aforeſaid, to which he is to be ſent, and to deliver him to the conſtable, or other officer, of ſuch firſt town, in ſuch next precinct, together with this paſs, and the duplicate of the examination of the ſaid E. F. taking his receipt for the ſame; and the ſaid E. F. is to be thence conveyed on, in the like manner, into the next adjoining ſhire, ſtewartry, or place, in that part of Great Britain called Scotland, and is there to be delivered to ſome conſtable, or other officer, of the next pariſh, diſtrict, or place, within ſuch next adjoining ſhire, ſtewartry, or place aforeſaid, taking his receipt for the ſame: And ſuch next officer in that part of Great Britain called Scotland aforeſaid, is hereby required to receive the ſaid E. F. and give ſuch receipt as aforeſaid, and to diſpoſe of him, the ſaid E. F. according to law. Given under my hand and ſeal at I. the day of years."

LV.

Vagrant Paſs to Ireland.

"To the Conſtable of A. in the county of B. and alſo to all Conſtables, and other officers, whom it may concern, to receive and convey, and to all other officers of the peace, whom it may concern, to receive and obey.

"WHEREAS E. F. was apprended in the town of A. in the ſaid county, as a rogue and vagabond; and upon examination of the ſaid E. F. taken before me C. D. Eſq. one of his majeſty's juſtices of the peace in and for the ſaid county, upon oath, (which examination is hereunto annex-

it clearly appears that the lawful ſettlement of him the E. F. is in the kingdom of Ireland: Theſe are therefore quire you, the ſaid conſtable of A. in the county of B. nvey the ſaid E. F. to the town of K. in the county of at being the firſt town in the next precinct through h he ought to paſs, in the direct way to the ſaid king- of Ireland, to which he is to be ſent, and to deliver to the conſtable, or other officer, of ſuch firſt town, in next precinct, together with this paſs, and the dupli- of the examination of the ſaid E. F. taking his receipt the ſame; and the ſaid E. F. is to be thence conveyed in like manner, until he ſhall arrive in the county of and the conſtable, or other officer to whom he ſhall be ered in the ſaid county of M. is hereby required to ap- o ſome juſtice of the peace in and for the ſaid county f. for a warrant to the maſter of any ſhip or veſſel bound the ſaid kingdom of Ireland, that ſhall lie in the ſaid ty of M. to take on board the ſaid ſhip or veſſel him the E. F. and convey him to ſuch place, in the ſaid king- of Ireland, as ſuch ſhip or veſſel ſhall be bound unto. r under my hand and ſeal, the day of years."

No. LVI.

Warrant to a Maſter of a Ship to export a Vagrant.

C. D. Eſq. one of the Juſtices of our Lord the King aſſigned to keep the peace within the county of B. to N. O. Maſter of the Ship called the P. of Q. now lying at R. and bound for S. in the kingdom of Ireland, ſendeth greeting.

THESE are, in the name of our ſaid lord the king, to ire you to take on board the ſaid ſhip the P, E. F. vag- , a native of the kingdom of Ireland, and having no ſet- ent in England, and him to carry to S. aforeſaid, in the dom of Ireland, or to ſuch other place in that kingdom ou ſhall arrive at, and for the charge thereof you ſhall ; and T. W. conſtable of V. at the time he ſhall ſerve with this warrant, ſhall pay, and is hereby required to

pay unto you, the ſum of , the ſame being the rate laſt appointed by the juſtices of our ſaid lord the king, aſſigned to keep the peace within the ſaid county, at their general quarter ſeſſions of the peace held in and for the ſaid county: And you are, on the back of this warrant, to ſign a receipt for the money ſo paid, and alſo for the ſaid vagrant ſo delivered unto you. Given under my hand and ſeal at I. in the ſaid county, the day of years."

No. LVII.

Soldiers Licence to paſs unapprehended from Scotland to England.

By A. B. one of his Majeſty's Juſtices of Peace for the Shire of C.

"WHEREAS it is made evident to me that D. E. was lately diſcharged from the regiment of foot, preſently lying in C. as being diſeaſed, and thereby unfit for the ſervice, and that his lawful place of reſidence is at F. in the county of G. and that he has nothing wherewith to aliment himſelf in his journey to that place. I do hereby licence him to paſs in days time, through the towns of and in the direct way to F. aforeſaid, and to aſk and take ſuch relief in his travel, in ſuch direct way aforeſaid, as any perſon ſhall willingly give him. Given at C. the day of years."

No. LVIII.

Form of a Complaint founded on the Act againſt Foreſtallers.

"UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. procurator of court, as well for his own as the public intereſt, upon C. That albeit, by the act of parliament James VI, parl. 12, c. 148, it is, *inter alia*, enacted, 'That whoever gets into his poſſeſſion, in any fair or market, any corns, victual, fleſh, fiſh, or other vivers, that ſhall be brought to be ſold, and ſells the ſame

again in any fair or market holden in the ſame place, or any other fair or market within four miles thereof, is to be adjudged a regrator; and the offender ſhall, for the firſt offence, forfeit the ſum of forty pounds Scots money: Yet, notwithſtanding whereof, true it is and of verity, that the ſaid C. defender has tranſgreſſed that law; in ſo far as, upon the day of years, about o'clock in the forenoon, or thereby, or upon one or other of the days of that month, D. brought into the pnblic fiſh-market of A. a large quantity of ſalmon, with an intention to ſupply the lieges therewith; That the ſaid C. defender, in order to raiſe the price of the ſaid commodity, purchaſed the ſaid ſalmon from the ſaid D.; and he the ſaid C. the next day, being the day of the ſaid month and year foreſaid, cauſed carry the ſaid ſalmon to the fiſh-market of E, (lying within one mile of the market of A.), where he ſold the ſame in retail to the lieges at an exorbitant price, whereby the ſaid C. is to be conſidered as a foreſtaller and regrator, and falls to be fined and amerciated in terms of the ſaid act of parliament. All or any part whereof being proven, the ſaid C. defender ought to be fined and amerciated in the ſum of 40l. Scots, payable to the complainer, and ordained to find caution not to commit the like treſpaſs in time coming. According to juſtice, for a terror to others to commit the like. Herefore," &c.

The defender being legally ſummoned at the purſuer's inſtance, and the diet of appearance being elapſed, the complaint is called in court, which the defender is entitled to ſee and anſwer, and a competent time will be aſſigned to him for that purpoſe. Upon his giving in anſwers, the procurator fiſcal will be allowed to ſee and reply thereto: And upon the proceſs being laid before the juſtices to adviſe, they will pronounce an interlocutor:

" Before anſwer, allowing to B. a proof of his complaint, and facts in his replies, and to C. a proof of the facts ſet forth in his anſwers; and to both parties a conjunct probation."

And in the event of the procurator fiſcal's bringing proof of his complaint by witneſſes, the defender's oath, or his judicial declaration, and that proof being held as concluded, the juſtices will pronounce judgment in terms of the act of parliament. And it may here be obſerved, that citations up-

on complaints or libels of this kind are given to one diet, and after the interlocutor or ſentence is read in open court, a ſummary warrant is iſſued againſt the defender for the fine, which may be inſtantly put in execution by imprisonment, and which ſummary warrant will be of the following, or ſuch like form:

" The juſtices having conſidered the complaint at the inſtance of B. againſt C. anſwers, replies, and proof adduced for the ſaid B.; find the complaint thereby proven; therefore fine and amerciate the ſaid C. in the ſum of 40l. Scots payable to the ſaid B. and grant warrant to the conſtables of court, and other executors of the law, to apprehend and impriſon the ſaid C. in the tolbooth of A. the keepers whereof are hereby ordered to receive and detain him till payment of the aforeſaid ſum of 40l. Scots."

No. LIX.

Form of a Complaint againſt the Uſer of Falſe Weights.

" UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. procurator fiſcal of court, as well for his own as the public intereſt, upon C, That albeit, by the laws and acts of parliament, and particularly by the acts James IV, parl. 4, c. 47; 96; James VI, parl. 19, c. 2, and parl. 22, c. 8; the uſers of falſe weights and meaſures are ſeverely puniſhable, yet, notwithſtanding whereof, true it is and of verity, that the ſaid C. defender, has tranſgreſſed theſe laws; in ſo far as, the defender being tenant and poſſeſſor of a ſhop lying in the city of A. in which he ſells , and other articles of merchandize, he has for theſe twelve months bypaſt, or thereby, ſold to perſons reſorting to his ſhop by falſe weights, and that are not ſtamped by authority as the law requires; and which weights the defender knew were falſe and deficient, as repeated complaints were made to him thereof; and lately, upon an application at the complainer's inſtance againſt the defender, the weights which he uſed, as aforeſaid, were lodged in court, when, upon adjuſting them with the legal ſtandard, it clearly appeared they were falſe weights, whereby the defender falls to be puniſh-

terms of law. All, or any part whereof being proven, ſaid C. defender ought to be puniſhed according to the erit of his tranſgreſſion; and the weights uſed by him, ove, ought to be condemned as falſe weights, and the nder ordained to find caution not to be guilty of the tice libelled in time coming, to deter others from coming ſuch offence. Herefore, &c."

No. LX.

Form of a Petition and Complaint againſt the Uſer of Falſe Meaſures.

UNTO the honourable his majeſty's juſtices of peace for county of A. the petition and complaint of B. procurator l of court, as well for his own as the public intereſt, bly ſheweth, That C. haberdaſher in A. has, for theſe months bypaſt, or thereby, kept in his cuſtody and poſon three yards, which are each about an inch and a half cient, or below the legal ſtandard, and are not ſtamped aled by authority, as the law requires, and with which s the ſaid C. has, during the time foreſaid, by himſelf ſervants, meaſured and ſold haberdaſhery, and other ls, to ſeveral perſons reſorting to his ſhop and warehouſe g in A. aforeſaid, to their great hurt and prejudice, and ch yards or meaſures the ſaid C. knew, or was preſumed now, were deficient of the legal ſtandard, and ſo falls to puniſhed and fined in conformity to the ſtatutes againſt uſers of falſe weights and meaſures.

May it therefore pleaſe your honours to grant warrant for ſerving this petition and complaint upon the ſaid C. and ordain him to lodge anſwers thereto with the clerk of court within a competent time; as alſo, to grant warrant to ſeize the yards or meaſures in the cuſtody of the ſaid C. and, upon evidence of the complaint, to condemn the yards and meaſures as deficient, and to puniſh and fine the ſaid C. conform to the demerit of his offence. According to juſtice, &c."

Upon the petition and complaint being laid before the juſtices, they will grant warrant for ſerving the ſame upon the defender, and ordain him to lodge anſwers thereto within a competent time; as alſo, they will order the yards or meaſures in his cuſtody to be inſtantly ſeized, and lodged in the clerk's hands; and, upon evidence being brought of the complaint, the juſtices will give judgment, condemning the yards as deficient, and will puniſh and fine the defender according to the demerit of his tranſgreſſion.

No. LXI.

Form of a Complaint fonnded upon the Game Laws.

" UNTO the honourable his majeſty's juſtices of the peace for the county of A. complains B. procurator fiſcal of court, as well for his own as the public intereſt, upon C, That albeit his majeſty's lieges are prohibited and diſcharged from deſtroying game, under certain pains and penalties; particularly, by an act of parliament 1621, c. 32, it is enacted, ' that no perſon ſhall hunt or kill hares, in the time of ſnow, under the penalty of 100l. Scots, *toties quoties*.' And by act of parliament 1707, c. 13, it is enacted, ' that no perſon whatever ſhoot hares, under the penalty of 20l. Scots, *toties quoties*.' As alſo, by an act of parliament, 13 Geo. III, c. 54, it is enacted, ' that no perſon, unqualified to kill game in Scotland, ſhall have in his or her cuſtody, or carry, at any time in the year, any hares, partridges, pheaſants, muirfowl, heathfowl, ſnipes, or quails, without the leave or order of a qualified perſon firſt obtained; and every perſon tranſgreſſing againſt this act ſhall, for the firſt offence, forfeit the ſum of 20s. ſterling; and for every ſubſequent offence 40s. ſterling:' As alſo, all perſons are thereby prohibited ' to take, kill, deſtroy, carry, ſell, buy, have in his or her poſſeſſion, or uſe any muirfowl, or tarmagan, between the 10th of November and 25th of July; nor any partridge between the 1ſt of February and 1ſt of September; nor any pheaſants between the 1ſt of February and 1ſt of October; nor any heathfowl between the 1ſt of December and 25th of Auguſt, in any year: That every perſon tranſgreſſing this act in any of the

reſaid caſes, ſhall, for every bird ſo taken, killed, deſtroy-, carried, ſold, bought, found in their poſſeſſion, or uſed, rfeit and pay the ſum of 5l. ſterling.' Notwithſtanding hereof, true it is and of verity, that the ſaid C. defender, s, within theſe three months paſt, and particularly when e ground was covered with ſnow, contravened the afore-id laws and acts of parliament, in all, or one or other of e caſes therein mentioned. All or any part whereof being oven, the ſaid defender ought to be fined, in terms of the id laws and acts of parliament, conform to the ſeveral anſgreſſions there againſt, and the fines levied applied in rms of ſaid acts. Herefore, &c."

No. LXII.

Interlocutor.

"THE juſtices having conſidered the complaint, and the fender's judicial declaration thereon, find the complaint ereby proven, in ſo far as, &c.; therefore, fine and amer-ate the defender in the ſum of ſterling; and grant arrant to the conſtables of court, and other executors of the w, to levy from the ſaid C. the ſaid ſum of ſterling, nd that by diſtreſs and ſale of his readieſt goods and chat-ls, (rendering to him the overplus, if any be), and to be pplied as directed by the acts of parliament libelled on; nd, for that end, to make houſes, locks, and gates, open and atent, and to uſe his majeſty's keys for that effect."

No. LXIII.

Execution.

"UPON the day of years, I C. D. conſtable, y virtue of the juſtices of the peace for the county of A. heir warrant to levy, by diſtreſs and ſale, dated the day f the ſaid month of and year foreſaid, proceeding pon a complaint preferred to them at the inſtance of B. rocurator fiſcal of court, for the public intereſt, againſt C.

residing in A. passed, with the witnesses after named, to the dwelling house of the said C. and did ask and demand of the said C. payment of the sum of sterling money, as the penalty forfeited by him for contravention of the acts of parliament anent the game, &c. more fully narrated in the said warrant, which demand he obstinately refused to comply with; therefore I, by virtue of the said warrant, did then and there, after my crying three several oyesses, making open proclamation, and public reading thereof, in his majesty's name and authority, and in name and authority of the said justices, apprehend and poind

, pertaining and belonging to the said C. in payment, *pro tanto*, of the sum contained in the said warrant: Thereafter, I made three several offers back of the said goods to the said C. or to any other person or persons who would compear in his name, and for his behoof, and pay the said penalty contained in the said warrant, who should have the same returned; but none compearing for that effect, I carried off the same, to be disposed of in terms of the said warrant, and applied as directed in the said acts of parliament. This I did after the form and tenor of the said warrant in all points. And I delivered to the said C. his servant, within his dwelling house, a just written schedule, or note, signed by me, of what I had so done; and which schedule or note did mention, that, if he did not immediately relieve the said goods, by payment of the said penalty, the same would be rouped and sold for payment thereof; and which schedule contained the date hereof, and the date of the said warrant, and the witnesses names who were present thereat, viz. E. and F. both indwellers in A."

No. LXIV.

Petition against one Shooting without a Licence.

"Unto the Honourable the Justices of Peace of the or any one of them,

"The Petition and Complaint of Solicitor of Stamp Duties for Scotland:

"Humbly sheweth,

"That, by the statute 25th of his present majesty, c. 1,

certain ſtamp duties are laid on certificates to be annually iſſued to perſons in Great Britain uſing any dog, gun, net, or other engine for the taking or deſtruction of game; and it is thereby enacted, 'that, from and after the firſt day of July 1785, if any perſon or perſons ſhall uſe any greyhound, hound, pointer, ſetting dog, ſpaniel, or other dog; or any gun, net, or other engine for the taking or deſtruction of any hare, pheaſant, partridge, heathfowl, commonly called black game, or grouſe, commonly called red game, or any other game whatſoever, without having obtained ſuch certificate in ſuch manner as is directed by the ſaid ſtatute, every ſuch perſon or perſons ſhall forfeit and pay the ſum of 20l.' to be recovered and applied as therein mentioned.

"And it is thereby further enacted, 'That no certificate obtained under any deputation or appointment of a gamekeeper, ſhall be pleaded or given in evidence in any caſe whatſoever, where the perſon having ſuch certificate ſhall have uſed, or ſhall uſe any greyhound, hound, pointer, ſetting dog, ſpaniel, or other dog; or any gun, net, or other engine for the taking or deſtruction of game, out of or beyond the precincts or limits of the manor or lands, for or in reſpect of which ſuch deputation or appointment was given and made.'

"By another ſtatute, paſſed in the 31ſt year of his preſent majeſty's reign, c. 21, certain additional duties are laid upon certificates of the deſcription before mentioned, from and after the 1ſt day of July 1791; and all proviſions and penalties eſtabliſhed by the previous ſtatutes therein referred to, or any other ſtatutes relating to the duties on vellum, parchment, and paper, and not thereby altered, are declared to be in full force and effect, in relation to the ſaid additional duty.

"By another act, paſſed in the 44th year of the reign of his preſent majeſty, c. 98, the former duties ceaſed and determined from and after the 10th day of October 1804, excepting as to certificates then in force, or as to the recovery of any arrears of the ſaid duties remaining unpaid, or as to any penalties or forfeitures incurred at any time before or on the ſaid 10th day of October; which laſt-mentioned ſtatute introduces the following duties on game certificates in lieu of thoſe repealed, viz. an annual duty of 3l. 3s. on every 'certificate to be taken out by every perſon who ſhall uſe

any dog, gun, net, or other engine for the taking or deſtruction of game:' And an annual duty of 1l. 1s. on every 'certificate iſſued to or taken out by any perſon, under any deputation or appointment of gamekeeper (being a menial ſervant.)' And by this ſtatute, all proviſions, penalties, matters, and things, in former acts, (unleſs where expreſsly altered by this act), are declared to extend to the ſaid new duties, commencing on the 11th October 1804.

"And by the laſt-mentioned ſtatute, it is enacted, That, from and after the 10th October 1804, no actions for fines, penalties, or forfeitures, ſhall be commenced, but in name of his majeſty's advocate, the ſolicitor, or ſome other officer of the ſtamp duties: And that, from and after the paſſing of ſaid act, (28th July 1804), 'all fines, penalties, and forfeitures, heretofore impoſed or granted by any act or acts relating to the duties on vellum, parchment, or paper, or this act, ſhall go and be applied to the uſe of his majeſty, his heirs and ſucceſſors, any thing in any act or acts to the contrary notwithſtanding.'

"That has contravened the ſtatutes before referred to, in ſo far as he has, within the ſpace of ſix months laſt paſt, uſed a greyhound, hound, pointer, ſetting dog, ſpaniel, or other dog; or a gun, net, or other engine for the taking or deſtruction of game, without having obtained ſuch ſtamped certificate as the law requires, whereby he has forfeited the ſum of 20l. ſterling; and this application is made for recovery of the ſame.

"May it therefore pleaſe your honours to grant warrant for ſerving this complaint on the ſaid and to appoint him to appear before you at ſuch time and place as you ſhall direct; as alſo to grant warrant for ſummoning witneſſes at the time and place ſo fixed; and, upon the appearance of the party accuſed, or in default of his appearance, to proceed to hear and determine the matter in a ſummary way; and, upon due proof being made thereof, either by the voluntary confeſſion of the party, or by the oath of one or more credible witneſſes, to give judgment or ſentence againſt the offender for payment of the ſaid penalty to the complainer or his ſucceſſors in office, for behoof of his majeſty, his heirs and ſucceſſors, to be

levied from the goods of the offender, and ſale to be made thereof, in caſe they ſhall not be redeemed within ſix days, rendering to the party the overplus, if any; and where ſufficient goods of the offender cannot be found to anſwer the penalty, and the ſame ſhall remain unpaid, to commit the offender to the common gaol, or houſe of correction, there to remain for the ſpace of three calendar months, unleſs ſuch penalty ſhall be ſooner paid and ſatisfied, and no longer.

According to juſtice, &c."

No. LXV.

Summons founded upon the Statute touching Mutual Incloſures.

"UNTO the honourable his majeſty's juſtices of peace for the county of A, complains B. upon C. That where, by the act Cha. II, parl. 1, ſeſſ. 1, c. 41, it is ſtatute and ordained, that, where incloſures fall to be upon the border of any perſon's inheritance, the next adjacent heritor ſhall be at equal pains and charges in building, ditching, and planting, that dike which parteth their inheritance; and true it is, that the complainer is proprietor of the lands of D. lying in the pariſh of E. and county of A. which, formerly, to the weſt, were unincloſed, and which the complainer lately incloſed with a ſtone dike, which, before incloſing, he acquainted the defender C. proprietor of the lands lying immediately to the eaſt thereof, and required him to concur in building the ſaid dike, which he having poſtponed, the complainer was obliged to cauſe build the ſaid dike or incloſure himſelf, which, as per accompt produced, amounts to the ſum of ſterling money, for the one half of which, being ſterling, the defender C. is liable, in terms of the aforeſaid act of parliament; and the more ſo, as he has taken the benefit of ſaid dike, by making it part of his own incloſures; which ſum the defender refuſes to pay, unleſs compelled: Therefore, the ſaid C. defender, ought and ſhould be decerned and ordained to make payment to the complainer of the aforeſaid ſum of ſterling money, together with a fifth part more of expence of plea. Herefore," &c.

No. LXVII.

Summons founded upon the Statute anent deſtroying Trees.

" UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. upon C. and D. that where, by the act James VII, parl. 1, ſeſſ. 1, c. 39, it is enacted, ſtatuted, and ordained, That no perſon ſhall cut, break, or pull up any tree, or peel the bark off any tree, under the penalty of ten pounds Scots for each tree within ten years old, and twenty pounds Scots for each tree that is above the ſaid age of ten years; and that the havers or uſers of the timber of any tree ſo cut, broken, or pulled up, ſhall be liable in the ſame penalty, except they can produce the perſons from whom they got it. Yet, notwithſtanding whereof, true it is and of verity, That the ſaid C. defender has contravened theſe laws, in ſo far as the complainer, being proprietor of about acres of ground, lying at E. in the pariſh of F. and county of A. aforeſaid; true it is, that the defender cut down of the complainer's ſaid trees, to the number of ; which trees were very large, and more than years old, and which he the ſaid C. defender ſold and diſpoſed of to the other defender D. whereby they the defenders are liable, jointly and ſeverally, in the ſum of twenty pounds Scots for each tree ſo cut down in terms of the foreſaid law. Therefore the ſaid C. and D. defenders ought and ſhould be decerned and ordained, conjunctly and ſeverally, to make payment to the complainer of the ſum of pounds Scots, in terms of and conform to ſaid act of parliament; and the defenders ought to be found, conjunctly and ſeverally, liable in the ſum of pounds Scots, as the expence of this proceſs, and decree to follow hereon. Herefore," &c.

No. LXVIII.

Summons founded on the Statute for herding Cattle.

" UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. upon C. that where, by the

act James VII, parl. 1, ſeſſ. 2, cap. 14, it is ſtatuted and ordained, That all heritors, liferenters, tenants, cottars, and other poſſeſſors of lands and houſes, ſhall cauſe herd their horſes, nolt, ſheep, ſwine, and goats the whole year, as well in winter as in ſummer; and, in the night time, ſhall cauſe keep them in houſes, folds, or incloſures, that they may not eat or deſtroy their neighbour's ground, wood, hedges, or planting; certifying ſuch as contraveen, that they ſhall pay half a merk, *toties quoties*, for every beaſt they have going on their neighbour's ground, by and attour the damage done to the graſs or planting; and declaring that it ſhall be lawful for the heritors or poſſeſſors of the ground to detain the ſaid beaſts, until he be paid of the ſaid half merk for each beaſt found upon the ground, and of his expence in keeping the ſame. Notwithſtanding whereof, true it is and of verity, that the ſaid C. defender has tranſgreſſed the ſaid act of parliament; in ſo far as, he being tackſman of the farm of D. lying in the pariſh of E. and county of A. foreſaid, by himſelf, ſervants, and others, for whom he is anſwerable, upon the night betwixt the and the inſtant, allowed horſes and ſheep, the property of the ſaid C. to wander in the night-time, who broke over the complainer's hedges and incloſures, and have deſtroyed the ſame, whereby the complainer has ſuffered to the extent of about pounds ſterling of damages; which beaſts were ſeized by the complainer and his ſervants, and are yet in his poſſeſſion. And ſeeing the defender is, by the afterward ſtatute, not only liable to make up to the complainer his damages foreſaid, but is alſo liable in half a merk for each beaſt allowed to treſpaſs upon his ground, and for the expence of keeping ſuch beaſts; which the defender refuſes to pay unleſs compelled. Therefore, the ſaid C. defender ought and ſhould be decerned and ordained to make payment to the complainer of the aforeſaid ſum of ſterling, as the amount of the damage ſuffered by him in and on account of the defender's allowing his cattle to break through and deſtroy the complainer's hedges, incloſures, and others. *Item*, merks Scots money, being the penalty correſponding to the number of beaſts found and detained upon the complainer's grounds. *Item*, ſterling money, as the expence of the maintenance of ſaid cattle from the time

they were ſeized upon the complainer's grounds to the date hereof, and of ſuch further ſum as the complainers may be put to, ay and until they are relieved and taken off the complainer's hands; together with ſterling as the expence of this proceſs, and decreet to follow hereon. Herefore," &c.

No. LXIX.

Complaint founded upon the Statutes againſt the Celebrator of Clandeſtine Marriages.

" UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. procurator fiſcal of court, as well for his own as the public intereſt, upon C. That albeit, by the laws and acts of parliament, particularly by the act 1648, cap. 8; 1661, cap. 34; 1698, cap. 6; the celebrator of marriages, of whatever perſons, in a clandeſtine and irregular way, when ſuch perſon is not lawfully ordained and authorized by the kirk, is to be baniſhed, never to return: Yet, notwithſtanding whereof, true it is, and of verity, that the ſaid C. defender has tranſgreſſed theſe laws; in ſo far as, he has made it his practice, for theſe months bypaſt, in the county of A. aforeſaid, to celebrate clandeſtine and irregular marriages, to the great hurt and prejudice of the lieges, although the ſaid C. is not an ordained miniſter, nor qualified to celebrate marriages: And more particularly, upon the day of laſt, he the ſaid C. defender, contrary to law, aſſumed to himſelf the office of a clergyman or miniſter, and married D. to E. a lady of very conſiderable fortune, to the great diſpleaſure of her whole friends and relations; and theſe parties ſo married had not banns proclaimed, as the law requires; which irregular and clandeſtine marriage was celebrated by the ſaid C. in the houſe of F. innkeeper, lying within the ſaid county of A: From which it is evident that the ſaid defender acts and officiates as a celebrator of clandeſtine and irregular marriages: All or any part whereof being proven, the ſaid C. defender ought and ſhould be

ed this county for life, and never thereafter to be therein, with certification, for a terror to others to it the like. According to juſtice. Herefore," &c.

No. LXX.

Complaint againſt Party and Witneſſes.

Jnto the honourable his majeſty's juſtices of peace e county of A. complains B. procurator fiſcal of court, ll for his own as the public intereſt, upon C. D. and at albeit, by the laws and acts of parliament, and par-rly by the acts 1648, cap. 8; 1661, cap. 34; 1698, ; it is enacted, That whatſoever perſon or perſons marry, or procure themſelves to be married, in a clan-e or irregular way, by any perſon not authorized by rk, ſhall be impriſoned for three months, and ſhall be-pay, each nobleman one thouſand pounds Scots, each man and burgeſs five hundred pounds Scots, and each perſon five hundred merks, and ſhall remain in priſon they make payment of theſe reſpective penalties; and witneſſes to ſuch marriages, by the laſt act above recited, ible in one hundred pounds Scots: Yet notwithſtand-hereof, true it is, and of verity, that the ſaid C. D. . defenders have tranſgreſſed theſe laws: In ſo far as, id C. upon the day of years, without be-wfully proclaimed, as the law requires, procured him-be married to F. within the county of A. aforeſaid, a perſon not lawfully ordained to be a miniſter, nor rized to celebrate marriage; and they the other de-rs D. and E. were witneſſes to the aforeſaid irregular age of the ſaid C. to F. From all which, the defend-ld to be puniſhed, in conformity to the ſaid acts of par-nt.

All, or any part whereof, being proven, the ſaid C. D. defenders, ought and ſhould be fined and puniſhed, rm to the aforeſaid laws, for a terror to others to com-e like. Herefore," &c.

No. LXXI.

Complaint founded upon the Statute againſt Blaſphemy.

" UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. procurator fiſcal of court, as well for his own as the public intereſt, upon C. That albeit, by the laws and acts of parliament, and particularly by the acts 1661, cap. 21, and 1695, cap. 11, it is enacted, that whoever ſhall, in their writings or diſcourſes, deny, impugn, quarrel, argue, or reaſon againſt the Being of a God, or any of the perſons of the bleſſed Trinity, or the authority of the Holy Scriptures of the Old and New Teſtament, or the Providence of God in the government of the world, ſhall, for the firſt fault, be puniſhed with impriſonment, as and while they give public ſatisfaction to the congregation within which the ſcandal was committed, &c.: Yet notwithſtanding whereof, true it is, and of verity, that the ſaid C. defender has tranſgreſſed theſe laws: In ſo far as, he the ſaid C. within theſe three months paſt, wrote, compoſed, and publiſhed, a moſt blaſphemous pamphlet, intitled, ' ,' in which work he the defender denies the authenticity and truth of the Holy Scriptures of the Old and New Teſtament, and of the Providence of God in the government of the world, to the great hurt and prejudice of the morals of the public; and the ſaid C. being brought before your honours for examination, he, upon the day of emitted a declaration, acknowledging that he was the author of the aforeſaid blaſphemous performance, as his declaration, ſigned by him and D. E. Eſq. one of his majeſty's juſtices of peace for the ſaid county of A. in the clerk's hands, will teſtify: From all which it is evident that the ſaid C. defender is the author and publiſher of a blaſphemous work, and falls to be puniſhed according to law.

All or any part thereof being proven, the ſaid C. defender ought and ſhould be corporally puniſhed, in terms of law; and the aforeſaid publications ought to be deſtroyed and ſuppreſſed, by order of court; to deter others from committing ſuch practice in future. Herefore," &c.

No. LXXII.

Complaint founded upon the Statutes againſt Curſing and Swearing.

"UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. procurator fiſcal of court, as well for his own as the public intereſt, upon C. That albeit, by the laws and acts of parliament, and particularly the act 1551, cap. 16; 1581, cap. 103; 1661, cap. 19; 1672, cap. 22; 1690, cap. 25; 1693, cap. 40; 1696, cap. 31, profane curſing and ſwearing is prohibited, by whatever perſon or perſons, under certain pains and penalties vested in theſe acts: Yet, notwithſtanding whereof, true it is, and of verity, that the ſaid C. defender has tranſgreſſed theſe laws: In ſo far as, for theſe months bypaſt, he has made it his conſtant and habitual practice, in the public ſtreets of A. and other places, within the aforeſaid county of A. to profanely curſe and ſwear, in a horrid and ſhocking manner, to the great annoyance of the public in general, and though often reproved for, and deſired to deſiſt from ſaid practice, yet he the defender gloried in his iniquity, and ſo falls to be fined and puniſhed, in conformity to the laws made againſt thoſe who profanely curſe and ſwear.

All or any part whereof being proven, the ſaid C. defender ought and ſhould be fined and amerciated, in terms of ſaid laws, payable to the complainer, to be applied as the acts direct, to deter others from committing the like."

No. LXXIII.

Complaint on the Scottiſh Statute againſt Profanation of the Sunday.

"UNTO the honourable his majeſty's juſtices of peace for the county of A. complains B. procurator fiſcal of court, as well for his own as the public intereſt, upon C. and D. That albeit, by the laws and acts of parliament, particularly

by the acts 1579, cap. 70; 1592, cap. 124; 1593, cap. 163; 1594, cap. 201; and 1661, cap. 18; profanation of the Lord's day is prohibited, by whatever perſon or perſons, under the penalties therein contained: Yet, notwithſtanding whereof, true it is, and of verity, that the ſaid C. and D. defenders, have tranſgreſſed theſe laws: In ſo far as, upon the Lord's Day, being the day of betwixt the hours of and afternoon, in the public high ſtreet of A. and county aforeſaid, when the lieges were decently going to church, for the worſhip of God, the defenders did then and there, in defiance of religion, law, public order, and decency, traverſe alongſt the ſtreets, and made great noiſe and diſturbance, by uttering many horrid oaths and imprecations towards the lieges thus going to divine ſervice, as alſo, by ſinging lewd and obſcene ſongs, to the great profanation of the Lord's day, and annoyance of the inhabitants, whereby it is evident the defenders have contravened the laws enacted againſt Sabbath breakers.

"All or any part whereof being proven, the ſaid C. and D. defenders ought and ſhould be fined and puniſhed, in terms of the aforeſaid laws, the fines to be applied as the acts direct, and ordained to find caution not to be guilty of ſuch an offence in time coming, to deter others. Wherefore," &c.

APPENDIX III.

No. I.

Tenatio facta per Dominum Regem ſuper ſtabilitate terræ Scotiæ.

—A kind of Commiſſion of the Peace in the reign of Edward I, (for "*Ieoyntenement de la pays et de la quiete de la terre*;") and quoted in Vol. I, p. 4, as illuſtrative of Scottiſh Juriſdictions in thoſe days. Claus. 33, E. i, M. 13, *dorſo in cedula.* See Ryley, *Placit. Parl.* App. p. 503.

VAIT a remembrer que come noſtre ſeigneur le roy de ſon parlement qil tynt a *Weſtmuſter* en quarreine, l'an de ſon ne trentiſme tierz, euſt fait aſavoir par leveſqe de *Glagu*, le mte de *Carrik*, monſieur *Johan* de *Segrave* adunqes tenant le 1 le roy en *Loenois*, et par ſire *Johan* de *Sandale*, chamberleyne *ſcoce*, as les bones gentz de la terre D*eſcoce*, qil feiſent aſſembler communalte de la terre; et que entre eux touts, eleuſent certein mbre de gentz, pur venir de par meiſme la communalte a *Weſtſter* au parlement que noſtre ſeigneur le roy avoit ordene a tenira is ſemaynes apres la feſte de la nativite ſeynt *Johan* le *Baptiſte* chayn ſuant, le quel parlement fuſt eſſoigner tantque a la feſte laſſumption de noſtre dame, per maundement de noſtre ſeigr le roy, et puis tantque as uſtaves de la feſte de la nativite ſtre dame procheinement ſuant. Ac quelx lieu et terme les :ſqes de *Seint Andr.* et de *Dunkeldyn*, labbe de *Coupre*, et labbe *Monros*, le counte de *Boghan*, mounſieur *Johan* de *Mubray*, ounſieur *Robert* de *Keith*, mounſieur *Adam* de *Gurdain*, mounſieur han de *Inchmartyn*, vindrent come ceux qui feurent eſleux, et bees de par la communalte de la dite terre D*eſcoce*, et le count *trick* qui fuſt eſleu davoir eſte le diſſiſme de venir de par meiſme communalte ny vint mye, par quei par le commandement noſ- ſeigneur le roy y fuſt aſſignez mounſieur *Johan* de *Menetеth*.

E pur treiter des boſoignes *Deſcoce* enſemblement oue les gentz *Deſcoce* avant nomez furent aſſignez aſcunnes gentz *Dengleterre*, dunt les nouns ſont cy deſuth: Et eux tutz auſi bien les Englois come les eſcotz qui feurent preſentz au treitiz de celes boſoignes, et cheſcun de eux ſeveraument par commandement noſtre ſeigneur le roy feurent ſermentes ſolonc le purport des articles de lour eſcritz.

Leveſque de *Ceſtr.* labbe de *Weſtmuſter*, le counte de *Nicol*, mounſieur *Hugh* le *Deſpenſer*, mounſieur *Johan* de *Haſtings*, mes il ny poeit venir pur la maladie, mounſieur *Johan Boteturt*, mounſieur *Roger Brabazun*, mounſieur *William* de *Bereford*, mounſieur *Johan* de *Iſle*, meſtre *Raynard* de *Brandon*, frere *Hugh* de *Manceſtr.* ſire *Johan* de *Benſteade*, leveſque de *Wirceſtr.* labbe de *Waverle*, le counte de *Hereford*, mounſieur *Henr.* de *Percy*, mounſieur *William Martyn*, ſire *Johan* de *Sandale*, ſire *Rauf* de *Hengham*, monſieur *Roger* de *Heghham*, meſtre *Phelip Martell*.

Et endroit des dites boſoignes, entre ceux *Dengleterre* et *Deſcoce*, avaunt nomen, primerement treite eſt ſur le governaunt de la terre *Deſcoce*. Et quant a mettre gardein de la terre, accord eſt que mounſieur *Johan* de *Bretaine*, ſoit leutenant le roy en *Eſcoce*, and gardein de la terre.

Item, endroit del eſtat du chanceller, accord eſt que ſire *William* de *Bevercotes* demoerge chanceller *Deſcoce*.

Item, que ſire *Johan* de *Sandale* demoerge chamberlain *Deſcoce*, et que un contreroullur ſoit aſſigne a li, ceſt aſavoir ſire *Robert Heron*. Puiz eſt treitez et acordez de metere quatre poire des juſtices en la terre *Deſcoce*, et pur ce que les choſes ſoient meſnees de meillur array et plus a honour et au profit de noſtre ſeigneur le roy, et al aiſement du pople, eſt aſſentu que en Loeneis ſoient deux juſtices, ceſt aſavoir mounſieur *Johan* de *Isle*, et mounſieur *Adam* de *Gurdon*; en *Galway*, mounſieur *Roger* de *Kirkpatrick*, et mounſieur *Walter* de *Burghdon*. Et pur les terres de la mer *Deſcoce*, ceſt aſavoir entre la rivere de *Forth*, et les montz, mounſieur *Robert* de *Keth*, et mounſieur *William Inge*, et pur les terres de la les *Montz*, mounſieur *Reynauld* le *Chien*, et mounſieur *John* de *Vaux* du counte de Northumberl.

Item, accorde eſt, que les viſcuntes qui demorront en la terre, ſoient gentz nees de la terre *Deſcoce*, ou *Englois*, et ſoient mys et remuez par le lieutenant le roy, et par le chamberlein ſolonc lur diſcretion, et ceux viſcuntes facent loffice. *Deſcheterrie*, ſicome les viſcuntes ſoleient faire, et que ceux qui ſeront mys viſcuntes ſoient les plus ſuffiſauntz, les plus convenable, et les plus profitables que home purra trouver pur le roy, pur le pople, et pur la pees garder et meinteiner; et quant a ceo, ordene eſt de viſcuntes en la manere que ſon fuit.

Que le chamberlein qui aura la garde du chaſtel de *Berewyk*, mette deſoutz luy tiel pur eſtre viſcunte de *Berewyk* pur qui il voudra reſpondre.

D'*Edenburgh*, de *Hadington*, de *Linliſcu*, mounſieur *Ive* de *Adelburgh*, viſcunt; de *Pebles*, *Robert Haſting*, valett, viſcunt; de *Selirk*, celi qui eſt de *Fee*, viſcunt; de *Dunfres*, mounſieur *Richard Seymard*, viſcunt; de *Wygeton*, *Thomas Makhulagh*, viſcunt; de *Are*, mounſieur *Gedefori* de *Ros*. viſcunt; de *Lanark*, mounſieur *Henr.* de *Seint Cler*, viſcunt; de *Dumbretan*, mounſieur *Johan* de *Menetheth*, viſcunt et con.; de *Stryvelin*, *William Byſet*, viſcunt et con.; de *Clackmenan*, mounſieur *Maucolam*, de *Inner Peffre*, viſcunt; de *Ughtzeardour*, de *Kynros*, celi qui eſt de Fee, viſcunt; de *Fif*, mounſieur *Conſtantyn* de *Leghore*, viſcunt; de *Perth*, mounſieur *Johan* de *Inchmartyn*, viſcunt; de *Forfaire*, *William* de *Herth*, viſcunt; de *Kynkardyn*, mounſieur *Richard* de *Dummars*, viſcunt; de *Aberdeen*, mounſieur *Norman* de *Lathlyn*, viſcunt; de *Banf*, mounſieur *Wautar* de *Berkele*, viſcunt; de *Elgyn*, *William Wiſeman*, viſcunt; de *Forreis*, et de *Innervaryne*, *Alexander Wiſeman*, viſcunt; de *Innernis*, mounſieur *Johan* de *Eſtrivelyn*, viſcunt; de *Crenbathyn*, mounſieur *William* de *Mohaut*, qui eſt de *Fee*, viſcunt.

Item endroit de coroners, accorde eſt que le lieutenant le roy, le chaunceller, et le chamberlein, veent, queux coroners ſont en la terre ſuffiſantz, et ceux quil trovoront ſuffiſantz demoergent en lur offices, et ceux qui ne ſerront trovez ſuffiſantz et neent chartres du doun des offices ſoient oſtez, et que le lieutenant le roy, et le chaunceller, et le chamberlein, ſolonc lur diſcretion y mettent autres *Engleis*, ou gentz *Deſoce*, nees, qui ſoient ſuffiſantz mais les coroners qui ne ſerront trovez ſuffiſantz et eent chartres du doun des offices ne ſoient remuez tanque le lieutenant le roy, le chaunceller, et le chamberlein, eient ſur ne certifiez le roy, et quil eneit dit ſa volunte—Et accorde eſt que le lieutenant le roy, et le chaunceller, et le chamberlein, aviſent et certifient le roy a ſon procheyn parlement a treis ſemaynes de paſch, de ceux coroners qui ne ſerront trovez ſuffiſantz auſi bien de ceux qui unt chartres cum des autres qui ne les unt.

Item endroit de chaſteux, ordene eſt que lieutenant le roy eit en ſa main les chaſtelx de Rokeſburgh, et de Jeddeworte, ſicome le roy ad ordene.

Item que Monſieur *Johan de Kingeſton* demoerge conſtable et gardeyne du chaſtel de *Edenesburgh*.

Item que *Piers Luband* demoerge gardeyne de *Linliſcu*, ſicome le chamberlein li ad la *Garde Bache*.

Item que *William* Byſet demoerge conſtable et gardeyne du chaſtel de *Strivelyn*, et viſcunte, et la garneiſon du chaſtel ſoit

ordonee per le lientenant le roy, et par le chamberlein, a lur primere venue en *Deſcoce*.

Item que Monſieur *Johan Menteth* demoerge conſtable et gardeyne du chaſtel de Dumbretan, et viſcunte, et la gareiſon de ceu chaſtel ſoit ordenee per le lieutenant le roy, et par le chamberlein, a lur primere venue en *Eſcoce*.

Et fait en entendre, que le lieutenant le roy, et le chanceller, et le chamberlein puiſſent ſolonc lur diſcretion remuer les juſtices et viſcuntes avant nomez, et mettre y autres *Engleis*, ou gentz neez *Deſcoce* tielx, tome il verront que ſoient ſuffiſantz tutes les ſoitz que lur plerra, et ſi come il verront, que meutz ſoit al honour, et au profit du roy, et al aiſement du poeple, et par le maintenement de la pees.

Endroit des leis et uſages pur le governiment de la terre *Deſcoce*, ordene eſt que luſage de *Scots* et de *Brets* deſorendroit ſoit defendu, ſi que mes ne ſoit uſez. Et ordene eſt auſint, que le lieutenant le roy, de hour quil ſerra venuz en la terre *Deſcoce* face aſſembler les bones gentz de la terre en aucun certein lieu, le quel il verra que a ce ſoit covenable, et que illoeqes en la preſence de luy et des gentz qil y ſerront aſſemblez, ſoient rehercez les leis que le roy *David* fiſt, et auſint les amendementz, et les additions que unt eſte puis faitz par les roys. Et le lieutenant le roy entre li et le conſeil quil y aura, auſi bien des *Engleis* come des *Eſcotz* redreſcent et amendent les leis et les uſages qe ſon apartement encontre Dieu et reiſon, ſolonc ce quil purront en ſi brief terme, et ſi avant come il purront ſaunz laviſement du roy. Et celes choſes qil ne purront redreſcer, ne noſeront emprendre ſaunz le roi enſemblement oue celes, quil averont accordes ſoient mys en eſcrit diſtinctement et apartement per commun aſſent du lieutenant le roy, et des gentz qui y ſerront aſſembles, et deſous le ſeal le lieutenant ſoient poſtes au roy a *Weſtmuſter* a tres ſemaynes apres la Paſch procheynement abenir par meſme le lieutenant, et par certeines gentz *Deſcoce*, tantz et tielx come les gentz de la communalte de la terre, qui ſerront a cele aſſemble, voudront eſtre pur meſmes les choſes porter au roy as lieu et terme avandit; et que celx qi y vendront, cent plener poer de par la communalte de la terre pur acorder et affermer ce que enſerra ordene, auſi avant come eux tutz de la communalte purront faire, ſi y feuſſent preſentz, ſi que nemmeyns entre eux qui y vendront et les gentz que le roy voudra aſſigner a eux, puiſſent les dites choſes eſtre debves et examinees, et que homs puiſſe ordener et affermer tien redreſtement, pur quei la terre *Deſcoce* puiſſe meutz eſtre quies et governee atoutz jours mes. Et voet le roy, que ſon dit lieutenant ſoit illoeqes en propre perſone a meiſme loure. Puis commanda la roy et ordene eſt, que le dit

erme que feut mis a ſon lieutenant et as gentz *Deſcoce* por venir ıu parlement as trois ſemaines apres Paſch ſoit eſloignez tantque ı Laſcenſion.

Item endroit de demuer hors *Deſcocc* ceux, par qui la pees ɔorreit eſtre troublee, ordene eſt, que le lieutenant la roy quant l ſerra venez en *Eſcoce*, eit ſur ce conſeil et aviſement oue les ɔones gentz de la terre, et ceur quil trobera pas le counſeil qil y abera, quil facent a remuer par tiel acheſon enbe en *Engleterre* au roy en corteiſe manere, ſi qe le roy puiſſe ordiner a les faire demurrer en *Engleterre* dece *Trente*, ſicome il verra qe face a faire.

Item ordene eſt, qe Mounſieur *Alexandre de Lyndeſeie* demoerge hors *Deſcoce* par un demy an, ſi come autre foitz fuſt ordene.

Item accord eſt, qe commande ſoit au Counte de *Carrik*, qil mette le chaſtel de *Kyndromyn* en la garde de tiel homme pier qi il meiſmes voudra reſpondre.

Item ordene eſte, que Monſieur *Symond Fraſer* ſoit preſt et apparaillez le 20 jour de Noel, a mover de ſa dunques pur venir au roy, et pur aler par ſes journees de jour en autre tant qil ſoit hors due poer noſtre ſeigneur le roy, et hors du poer le roy de France pur tenir eriſ par quatre ans, ſi come autre foitz feuſt ordene, ceſt aſavoir a la grace et au repel de noſtre ſeigneur le roy.

Endroit des buſoignes *Deſcoce* que deyvent eſtre treitees quant au government de la terre *Deſcoce*, par les gentz a ce aſſignez, voet noſtre ſeigneur le roy, qe eux tutz auſi bien les *Engleis* come les *Eſcotz*, ſoient charges et ſermentez ſur le corps noſtre ſeigneur, et ſur ſeintes reliques, et ſur ſeintes changeilles, ceſt aſavoir cheſcun ſeveraument en la manere qe ſenſuyt.

Que vous bien et loyaument dirrez et conſeillerez, ce que vous ſenterez, que purra torner a meyntenement de la pees et de la quiete de la terre, et de la ſeignurie, et du poyle noſtre ſeigneur le roy, eſpecialment en la terre *Deſcoce*. Et qe les deſtourbances et les empeſchementz que vous avez ſeu et ſavez, ou purrez ſavoir que unt eſte et ſont ou purront eſtre contre la pees et la guide de la terre, et de la ſeignurie, et du poyle noſtre ſeigneur le roy, et nomement en la dite terre *Deſcoce* en quel choſe qe ce ſoit vous dirrez et deſcloſerrez ountement ſolonc voſtre entendement loialment et en bone foy, et comment la terre purra meltz eſtre quiee et goverue. Et ſi vous ſachez lei ou uſage par quei la pees et la quiete de la terre, de la ſeignurie et du poyle noſtre ſeigneur le roy et nomement en la terre *Deſcoce*, eit eſte, ou ſoit, ou purra eſtre trouble en nule manere, que vous les dirrez as autres qui ſont auſint aſſignez a ce conſeil, et ſur ce dirrez voſtre conſeil, et voſtre avys entre eux enſemble par commune accord, par quei la defaut puiſſe eſtre amende, ſi avant come vous ſaverez: Car le roy voet overir pur vous conſeil. Et que pur amur,

ne par hair, ne par parente, ne par affinite, ne par chose que puis aveniz, ne par serment, ne par alliance que vous aiez fait avant ces houres, a qui ce ce soit, vous ne lerrez de faire, de dire ne de conseiller les choses devus dites a tut vostre sen, et a tut vostre part. E ce de chose ce soit fait ou dite, ou parlee entre vous et les autres qui sunt, entendantz a cest conseil vous ne accuserez nul autre: Et ce les choses treitees et accordes vous tendrez secrees, si ce eles ne soient descovertes, tantque vous les ses mustrez au roy et a ceux qil i voudra aseer, et qil eit sur ce dit et ordine sa volunte. Et si vus sachez nul qi demoere en la terre Descoce purra torner a voluntiers de la pees, et le quel banist meiz aventurer hors de la terre *Descoce*, pur le meyntenement de la pees, ce vous les mustrez, et direz verite ment qi ceu, et touz ceux qui vous saverez qui sutent sieix. Et ce tuz les choses suspites direz et conseillerez al honnour de nostre seignur le roy, et a quiete et au profit de vous et vos autres voiez quiz de son royaume, et de seignurie.

Et fait a remembrer, ce le roy a son parlement des dites octaves de la nativite nostre dame commanda devant son conseil au chamberlein *Descoce*, ce les burgeis de *Berewik* ce soient bailles et tenuz solonc les ertenz ce furent faitez par son commandement, puis le conquest. Et ce tuit chartes purchaces a tenir par meisdre ertenz ne soit allocee.

No. II.

Small Debt Court tried with good Effects in Denmark, —mentioned in Vol. I, p. 117.

Il réſultera de plus grands avantages d'une inſtitution, qui ſubſiſte depuis l'année 1795, et dont le germe ſe trouvait déjà dans quelques diſpoſitions antérieures; ce ſont les tribunaux de conciliation. Dans la capitale, on choiſit un des aſſeſſeurs du tribunal de la cour et de la ville, un des membres du magiſtrat et un des trente repréſentans de la bourgeoiſie. Dans les autres villes le magiſtrat propoſe quatre ou ſix citoyens éclairés et probes, entre leſquels la bourgeoiſie en choiſit deux. Les avocats ſont exclus de la liſte des candidats. A la campagne, les baillis ſont chargés de la conciliation; et lorſque l'étendue du bailliage ne leur permet pas de s'acquitter eux-mêmes de cette fonction dans tous les arrondiſſemens, ils nomment pour ſe remplacer des hommes intelligens et d'une conduite eſtimable.

La plupart des affaires civiles ſont de la compétence des tribunaux de conciliation. Il n'eſt cependant pas interdit aux cours de juſtice de propoſer des moyens conciliatoires dans les cauſes qui auront été directement traduites devant elles. Les tribunaux de conciliation ſiégent à huit clos, et une fois la ſemaine, excepté dans la capitale, où le ſéances ſont auſſi fréquentes que les circonſtances l'exigent. Au cas que les parties ne s'accordent point, la procédure eſt regardée comme non avenue, et il n'eſt point délivré de procès-verbal. Si la conciliation a lieu, elle eſt enregiſtrée, et dès-lors elle équivaut à une ſentence juridique. La procédure ne doit durer au delà de huit jours dans les villes, et de quinze à la campagne, à moins qu'il n'y ait conſentement des deux parties à un plus ample délai. Les pièces peuvent être expédiées ſur papier non timbré. Aucune affaire n'eſt entamée en cour ordinaire, à moins que le demandeur ne puiſſe prouver avoir eu recours à la conciliation. Les frais de la procédure ſont de 64 ſchellings, qui ne ſe paient que dans le cas, où l'accommodement a lieu. L'impuiſſance où pourrait être une des parties d'acquitter les frais, ne doit point empêcher le tribunal de procéder. A Copenhague, où les juges du tribunal ſont des employés publics, ayant un ſalaire, et des citoyens aiſés qui doivent s'honorer de remplir une fonction ſi utile, les frais ſe réduiſent à 12 ſchellings pour la citation. Tout citoyen qui, pendant huit années, ſe ſera acquitté avec zèle des devoirs de juge de conciliation, obtiendra des diſtinctions honorables. Bornés d'abord en Norvège aux villes, les tribunaux dont il s'agit, ont été étendus dans ce royaume, aux campagnes, depuis l'année 1797, avec les modifications qu'exigent les localités.

Une courte expérience a ſuffi pour convaincre le gouvernement de l'utilité de cette inſtitution. Pendant les trois années qui précédèrent celle de ſa création, il avait été porté, devant les cours en première inſtance, 25,521 cauſes; pendant les trois années ſubſéquentes, le nombre n'a été que de 9,653; différence par conſéquent de 15,868.

No. III.

Report of the Juſticiary Clerk concerning Trials before inferior Courts without calling a Jury,—referred to in Vol. I, p. 194.

Edinburgh.—THE magiſtrates of the city of Edinburgh, by one of their clerks, report, that the conſtant practice has been to try thieves and other offenders, on a complaint at the inſtance of the procurator fiſcal, *de plano*, without calling a jury; and in every caſe where the crime deſerved it, to inflict corporal puniſhment, by whipping, impriſonment, baniſhment, pillory, and the like; and it does not appear from the records, that ever a jury was called to try culprits for leſſer delicts, but the proceedings have been uniformly *de plano* as at preſent.

Glaſgow.—THE magiſtrates of Glaſgow report by their clerk, that they have been in the conſtant and immemorial practice of inflicting corporal puniſhments, ſuch as whipping, pillory, &c. on culprits who have been convicted of theft and other petty crimes, and this always without a jury; and they apprehend it would be impracticable to preſerve the peace and police of the city without a power of that ſort being lodged with the magiſtrates.

Aberdeen.—THE magiſtrates of Aberdeen, by their clerk, report, that it has been the immemorial and invariable practice of the magiſtrates of that city to inflict corporal puniſhments, ſuch as impriſonment, drumming, whipping, pillorying, &c. upon all culprits convicted of leſſer crimes *de plano*, without calling or impanelling a jury; and it was never known or heard of their powers being once called in queſtion: That there does not appear upon the records of the burrough-court a ſingle inſtance to the contrary of this practice, excepting in the caſe of a freeman-barber and heritor of the town, who was tried about the year 1758, for extreme oppreſſion and cruelty committed againſt his apprentice: In which caſe, as the concluſions of the libel were for a very

high fine and damages, as well as for deprivation of the defender's freedom of the town, the magiſtrates were adviſed to try him by a jury of his fellow citizens, which they accordingly did.

Perth.—THE magiſtrates of Perth report, that it has been the immemorial practice there to try criminals, without juries, for all petty crimes, in actions at the inſtance of the procurator fiſcal; and to inflict corporal puniſhments on ſuch delinquents, by impriſonment, whipping, pillorying, or baniſhment; and juries are never called, but in trials where a capital puniſhment is intended, of which they have inſtances. They further obſerve, that if inferior judges were deprived of the power of puniſhing corporally, for leſſer crimes, without juries, eſpecially in towns, many defects would paſs with impunity, as it would be found extremely troubleſome, and almoſt impracticable, to adopt the forms of a jury trial for every petty crime that occurs in a populous town.

Stirling.—THE magiſtrates of Stirling report, that they have been in uſe to try culprits for ſmaller treſpaſſes, and to inflict corporal puniſhments upon them, ſuch as baniſhment, impriſonment, and the like, *de plano*, without calling a jury; the ſentence of baniſhment always containing a certification of impriſonment and whipping in caſe of a return; and inſtances have occurred where theſe certifications have been put in execution.

Ayr.—THE magiſtrates of Ayr report, that it has not been the practice there to inflict a corporal puniſhment upon culprits for ſmaller treſpaſſes further than impriſonment, without a trial by a jury.

Dumfries.—THE magiſtrates of Dumfries report, that there has not been a trial of any crime by jury before them in the memory of man; that there have been ſome trials of petty theſts, all without jury; but the magiſtrates have not proceeded to any higher puniſhment than baniſhment from the town and liberties for a certain term of years; ſometimes by way of addition to the puniſhment of baniſhment, the delinquent has been conducted from the one end of the town to the other by the common executioner, and by beat of drum;

but no perſon for theſe many years has been by the magiſtrates ſentenced to be whipt or pilloried. They further obſerve, that if trials for petty thefts or leſſer crimes, were not to proceed without a jury, ſuch crimes would moſt likely paſs altogether unpuniſhed.

Inverneſs.—THE magiſtrates of Inverneſs report, that they have, on different occaſions, inflicted the corporal puniſhments of whipping, pillory, &c. without the formality of a jury.

SHERIFFS.

Edinburgh.—THE ſheriff of Edinburgh reports, that a ſearch has been made into the records of that court for more than forty years back; and of all the numerous ſentences of whipping, &c. pronounced and executed in that period, none of them have been inflicted by trial by jury, except one againſt Hood, a hecklemaker, in 1749, in whoſe caſe a capital indictment was laid; but upon pleadings, and before determining the relevancy, the libel was reſtricted to an arbitrary puniſhment.

Aberdeen.—THE ſheriff-ſubſtitute of Aberdeen reports, that it has not been in the practice in that county to inflict corporal puniſhments for leſſer crimes or treſpaſſes without trying the perſons accuſed by a jury.

Argyle.—THE ſheriff of Argyle reports, that a thorough ſearch has been made into the records of the ſheriff court of that county, but from them it does not appear that the ſheriff was ever in uſe without a jury to inflict any other corporal puniſhment for petty crimes than a few days impriſonment, and that only in caſes of riot or battery, where a fine was awarded to compel payment; neither does it conſiſt with the knowledge of the oldeſt practitioners there, that the ſheriff ever went further in diſcuſſing criminal proſecutions.

Roxburgh.—THE ſheriff of Roxburghſhire reports, that the uniform practice in that ſhire for ſeveral years paſt has been to try by a jury wherever a corporal puniſhment might be

he conſequence of guilt being proven, although from the ecords inſtances appear of ſetting on the croſs or pillory, nd even whipping, when the trial was not made by a jury: ll theſe are above twenty years ago.

Dumfries.—THE ſheriff of Dumfriesſhire reports, that it as always been underſtood where the puniſhment was to e extended beyond a fine and impriſonment, that the culprit as entitled to be tried by a jury. Only two culprits have een whipt within theſe twenty years, and both theſe had ials by jury.

Ayr.—THE ſheriff-ſubſtitute of Ayr reports, that he has een above twenty years ſheriff-ſubſtitute of this county, and ever knew an inſtance of any, even the ſmalleſt corporal uniſhment, (impriſonment always excepted), inflicted, but pon trial by jury, nor did he ever hear of any ſuch thing ppening there.

Lanark.—THE ſheriff of Lanarkſhire informs, that ſheriff ourts for that county are kept at Hamilton and Lanark as ell as at Glaſgow. That, at Hamilton, it does not appear om the criminal records there, from 1748, that any trial d proceeded but by jury: That one appears in the court ooks without a jury, at the inſtance of the procurator fiſcal ainſt one Scott, who was ſentenced to be impriſoned, hipt, through Hamilton, branded with a hot iron on the ce, and baniſhed the county for life in January 1773: That, Lanark, neither from the records nor from the practioners s he been able to learn of any corporal puniſhment in-ted without a jury from the 1748: That, at Glaſgow, e criminal record has been ſearched from the year 1748, hich contains an infinite number of trials, followed by cor-ral and ſome of them even by capital puniſhment, but all them were jury trials. That the court books or act books d alſo been looked over without meeting with any inſtance corporal puniſhments, except one of a perſon being pil-ried, and another of a perſon being drummed through the wn upon ſentence within theſe three years; in both which ſes, the culprits had made ample confeſſion, and were isfied the puniſhment was milder than they deſerved.

Stirling.—The ſheriff of Stirling reports, that after a good deal of ſearch, he can find that in no inſtance the ſheriff of the county inflicted a corporal puniſhment upon a culprit without a trial by jury other than impriſonment.

Perth.—The ſheriff of Perth reports, that he has always held that a ſheriff has no power, in crimes great or ſmall, to inflict any corporal puniſhment without a jury trial; and accordingly, ſince he came into office in the year 1755, there never has been a libel concluding for the pains of law, or any corporal puniſhment, tried without a jury; and in corporal puniſhment, he includes even impriſonment in *modum pœnæ*, with the ſingle exception of impriſonment for contempt of court, and prevarication of a witneſs. That in actions of a mixed nature, where pecuniary damages are concluded for; ſuch as moleſtation, petty riots; their practice is to impriſon till payment. They alſo impriſon for ſecurity in caſes of *meditatione fugæ*; but theſe are not in *modum pœnæ*.

Inverneſs.—The ſheriff reports, that on ſearching the records there does not appear any inſtance of corporal puniſhment, ſuch as whipping, pillory, &c. either with or without a jury, till the preſent ſheriff was appointed; and any judgment of that kind has been by jury: That there are many inſtances of fines and impriſonment by trials without jury.

No. IV.

Magdalene Cochran, otherwiſe Campbell, Widow and Adminiſtratrix of Captain John Campbell of Carrick, Appellant; Mrs. Jean Campbell, Reſpondent.—Quoted Vol. II, p. 205.

On 3d July 1724, captain Campbell gave Mrs. Magdalen Cochran the following holograph certificate: "At Paiſley, 3d July 1724, this day, I John Campbell of Carrick, do hereby certify and declare, that I was ſolemnly and lawfully married to Mrs. Magdalene Cochran, lawful daughter of

A. C. of B. now my dear wife. Witneſs my hand, place and date foreſaid, JOHN CAMPBELL." The parties did not publicly acknowledge any marriage. In 1726, Captain Campbell married Mrs. Jean Campbell, who was publicly owned as his wife, and bore him ſeveral children. There was evidence that the captain and Mrs. Jean Campbell had, on ſome occaſions, met the ſaid Mrs. Magdalene Cochran at houſes, when they were treated as man and wife, without Mrs. Magdalene Cochran either oppoſing the ſame, or pretending herſelf to that character. But even, after all this, an occaſional intercourſe continued between the captain and Mrs. Magdalene Cochran. In the 1745 the captain was killed abroad. Mrs. Magdalene Cochrane and Mrs. Jean Campbell brought ſeparate actions before the commiſſaries for having their reſpective marriages declared.

June 23, 1747, the commiſſaries pronounced the following interlocutor in the appellant's proceſs, viz. "The commiſſaries having conſidered the libelled ſummons, and declarator of marriage at the inſtance of Mrs. Magdalene Cochran, with the writs therewith produced, defences for Mrs. Jean Campbell thereagainſt, anſwers thereto, replies and duplies, have, before anſwer, allowed Mrs. Magdalene Cochran a proof of her libel, and of all facts and circumſtances tending to infer the marriage libelled; and grant diligence accordingly."

The reſpondent preſented a bill of advocation to the court of ſeſſion, 7th July 1747, which being refuſed by Lord Arniſton, a petition to the court was preſented, and "the lords ordained the ſame to be ſeen and anſwered; and that in the anſwer Mrs. Magdalene Cochran ſhould particularly condeſcend on the facts by which her claim was to be maintained, and of the witneſſes by whom theſe facts were to be proven." Anſwers were lodged, and therewith a liſt of her witneſſes, and of the facts ſhe propoſed to prove; and the court, 28th July 1747, "remitted to the lord ordinary to remit the bill of advocation to the commiſſaries, with this inſtruction, to find that Mrs. Kennedy (Mrs. Magdalene Cochran) was barred *perſonali exceptione* from being admitted to prove that ſhe was married to Mr. Campbell of Carrick, before he was married to the petitioner Mrs. Jean Campbell, the now reſpondent." And the lord ordinary, by his deliverance, 29th July 1747, "remitted to the commiſſaries,

with this inſtruction, to find that Mrs. Kennedy (Mrs. Magdalene Cochran) was barred, *perſonali exceptione*, from being admitted to prove that ſhe was married to Mr. Campbell of Carrick before he was married to the petitioner Mrs. Jean Campbell."

The commiſſaries, 5th Auguſt 1747, "found, that Mrs. Kennedy (Mrs. Magdalene Cochran) was barred, *perſonali exceptione*, from being admitted to prove that ſhe was married to Mr. Campbell of Carrick before he was married to Mrs. Jean Campbell." And the commiſſaries, by another interlocutor, 6th Auguſt 1747, "found the facts, circumſtances, and qualifications, as proven by the writs and documents produced for, and depoſitions of the witneſſes led in behalf of the ſaid Mrs. Jean Campbell relevant to infer marriage; and found that the ſaid deceaſed Captain John Campbell of Carrick, and the ſaid Jean Campbell were husband and wife; and therefore found and declared, in behalf of the ſaid Mrs. Jean Campbell, conform to the concluſion of her libel; and found that Mrs. Kennedy (Mrs. Magdalene Cochran) was barred, *perſonali exceptione*, from being admitted to prove that ſhe was married to the ſaid Captain John Campbell, before his marriage with the ſaid Mrs. Jean Campbell; and therefore diſmiſſed the proceſs of declarator at her inſtance, and aſſoilzie the ſaid Mrs. Jean Campbell ſimpliciter therefrom; and decern accordingly." Theſe interlocutors being brought under the review of the houſe of lords, by appeal, were reverſed, 6th February 1748, and the interlocutor of the commiſſaries affirmed. The cauſe thus went back to the commiſſaries, 25th January 1751, who "having conſidered the purſuer Mrs. Magdalene Cochran her libel, with the depoſitions of the witneſſes adduced by her, together with the certificate, and other written documents given in for proving her marriage; and having alſo conſidered the documents produced for Mrs. Jean Campbell for proving her marriage, with the depoſitions of the witneſſes likewiſe adduced in her declaration of marriage and legitimacy, which are repeated in this proceſs, and particularly the proof of Carrick, and her overt cohabitation as huſband and wife from the beginning of the year 1726 until the year 1743, when he went abroad with the highland regiment, they find that the ſaid Mrs. Magdalene Cochran hath not proved her prior marriage libelled, and therefore diſmiſs her proceſs, and aſſoilzie the

fenders, and find the facts, circumſtances, and qualifica-ns, as proven for Mrs. Jean Campbell, relevant to infer ırriage, and find the deceaſed Campbell of Carrick d ſhe were huſband and wife; and Miſs Jean Campbell ɔcreate betwixt them is their lawful daughter; and de-ɪn accordingly." A bill of advocation being preſented of s interlocutor, the court of ſeſſion pronounced this inter-:utor, 19th June 1751: "The lord ordinary, after adviſing th the lords, and hearing counſel on both ſides, refuſes : bill." This interlocutor was affirmed.

No. V.

th Dec. 1805.—*Mrs. Agnew and her Commiſſioner againſt Sir Stair Agnew of Lochnaw, Baronet,*—mentioned Vol. II, *p.* 243, F.

"THE lords, on report of the lord probationer (Robert-t), after hearing counſel in preſence, and having adviſed : mutual memorials for the parties, find the defender liable a ſuitable aliment to the purſuer Mrs. Martha Agnew, ɪm the day of September 1792, being the day of : death of her deceaſed huſband, and, in time coming, ring the joint lives of the ſaid Mrs. Martha Agnew and : defender; and, before anſwer, as to the amount of the ment, ordain the defender to give in a condeſcendence, in ms of the interlocutor of the 8th June laſt, and that with-ten days, under an amand of 40s. ſterling; and when ren in, allow both purſuers to ſee and anſwer the ſame thin ten days thereafter." This interlocutor has been ɔught under review by a reclaiming petition, which has en appointed to be anſwered.

No. VI.

Mary Brown, reſiding in Berwick upon Tweed, and the Overſeers of the Poor there, and their Mandatory, Purſuers, againſt the Heritors and Kirk Seſſion of the Pariſh of Mordington, Defenders.

MARY BROWN, and Alexander Brown her huſband, acquired a ſettlement in the Scottiſh pariſh of Mordington, by reſiding there for more than three years without parochial aid. At Whitſunday 1794 they removed to the town of Berwick, the huſband working as a tailor, till the year 1798, when he enliſted as a ſoldier, leaving his wife and family in poverty. Though they had lived ſo long in Berwick, they had not, according to the laws of England, acquired a ſettlement. As caſual poor, however, their preſent neceſſities were ſupplied from the poor funds of Berwick, till it ſhould appear what pariſh was ultimately liable. For this purpoſe, an action was brought before the ſheriff of Berwickſhire againſt the pariſh of Mordington, as liable to maintain the ſaid Mary Brown and her children, two of whom had been born in the pariſh of Foulden, two in the pariſh of Mordington, and one in the pariſh of Berwick. "The ſheriff-ſubſtitute having," &c. March 5, 1801, "finds, that where parents have acquired a legal ſettlement, they acquire not only for themſelves, but for ſuch of their children as are indigent, and with them during the time of ſuch acquirement: Finds, from Mary Brown's declaration, ſhe nor her children have no claim to aliment from the pariſh of Mordington; and refuſes the petition." This cauſe came under the review of the court of ſeſſion by advocation; and 5th March 1803, "The lord ordinary having heard parties procurators, in reſpect the proclamation fixing pariſh ſettlements requires three years reſidence, immediately preceding application for charity; and that, in the preſent caſe, the paupers reſided in Berwick for upwards of three years, after leaving the pariſh of Mordington; therefore repels the reaſons of advocation; and remits the cauſe ſimpliciter to the ſheriff; ſuperſeding extract till May." Thereafter his lordſhip, December 8, 1803, "having again conſidered this repreſentation, with

the anſwers thereto, and whole proceſs, finds, that, in the interlocutor of 5th March laſt, in order fully to expreſs the opinion the lord ordinary entertained upon hearing the cauſe, there ought to have been added after the word charity, 'or rather lays the burden upon that pariſh where the pauper had laſt reſided for three years together;' but in reſpect the preſent caſe contains this ſpecialty, that the intermediate reſidence, though for more than three years, and ſuch as in Scotland would have ſubjected the pariſh where that reſidence took place, was in Berwick upon Tweed, where, it is contended, the reſidence ſpecified is not ſufficient to eſtabliſh a ſettlement, and therefore involves the conſideration of the law of another country, makes avizandum with the cauſe to the whole lords; and appoints the parties to prepare informations againſt the box-day in the enſuing Chriſtmas receſs, and put printed copies thereof into the lords boxes, in order to be reported." The court, on adviſing mutual memorials, with the opinion of Engliſh counſel, "repelled the reaſons of advocation; and remitted to the ſheriff ſimpliciter; and found the advocators liable in the expence of extract."

This interlocutor has been brought under review, on papers which have not yet been adviſed.

No. VII.

Miniſter of Jedburgh againſt John Davidſon's Truſtees, —mentioned Vol. II, p. 413, note d.

The court altered the interlocutor above inſerted, and decided the cauſe as follows:

Edinburgh, 19th Nov. 1805.

"THE lords having adviſed this petition with the anſwers thereto, alter the interlocutor reclaimed againſt; and in terms of the former interlocutor of 30th November, find the petitioner entitled to a full graſs glebe over and above the glebe he preſently enjoys; and in ſo far find the letters orderly proceeded, and decern: Further, find the petitioner entitled to expences, and allow an account thereof to be given in; and remit to the lord ordinary to hear the parties further on the other points of the cauſe, and to do therein as to his lordſhip ſhall ſeem juſt."

TABLE for converting Scotch Standard Bolls of Wheat, Rye, Beans, Pease, and Salt, into Winchester Bushels and Quarters; and Winchester Bushels and Quarters into Scotch Bolls.

Scotch into English.			English into Scotch.	
Scotch Standard.	Winchester		Winchester.	Scotch Standard Bolls.
	Bushels.	Quarters.		
Lippie 1	.0638635	.0079829	Quartern 1	.0152914
Peck 1	.2551542	.0319318	Peck 1	.0611656
Firlot 1	1.0218167	.1277271	Bushel 1	.2446623
Boll 1	4.0872667	.5109083	Quarter 1	1.9572983
2	8.1745833	1.0218167	2	3.9145965
3	12.2618	1.532725	3	5.8718948
4	16.3490667	2.0436333	4	7.8291931
5	20.4363334	2.5545417	5	9.7864914
6	24.5236	3.06545	6	11.7437896
7	28.6108667	3.5763583	7	13.7010879
8	32.6981334	4.0872667	8	15.6583862
9	36.7854001	4.598175	9	17.6156844
10	40.8726667	5.1090833	10	19.5729827

TABLE for converting Scotch Standard Bolls of Barley and Oats, nto Winchester Bushels and Quarters; and Winchester Bushels and Quarters into Scotch Bolls.

Scotch into English.			English into Scotch.	
Scotch Standard.	Winchester		Winchester.	Scotch Standard Bolls.
	Bushels.	Quarters.		
Lippie 1	.0931656	.0116457	Quartern 1	.010482
Peck 1	.3726625	.0465828	Peck 1	.041928
Firlot 1	1.4906502	.1863313	Bushel 1	.167712
Boll 1	5.9626008	.7453251	Quarter 1	1.341696
2	11.9252016	1.4906502	2	2.683392
3	17.8878024	2.2359753	3	4.025088
4	23.8504032	2.9813004	4	5.366784
5	29.813004	3.7266255	5	6.708480
6	35.7756048	4.4719506	6	8.050176
7	41.7382056	5.2172757	7	9.391872
8	47.7008064	5.9626008	8	10.733568
9	53.6634071	6.7079259	9	12.075264
10	59.6260079	7.453251	10	13.416960

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ERRATA.

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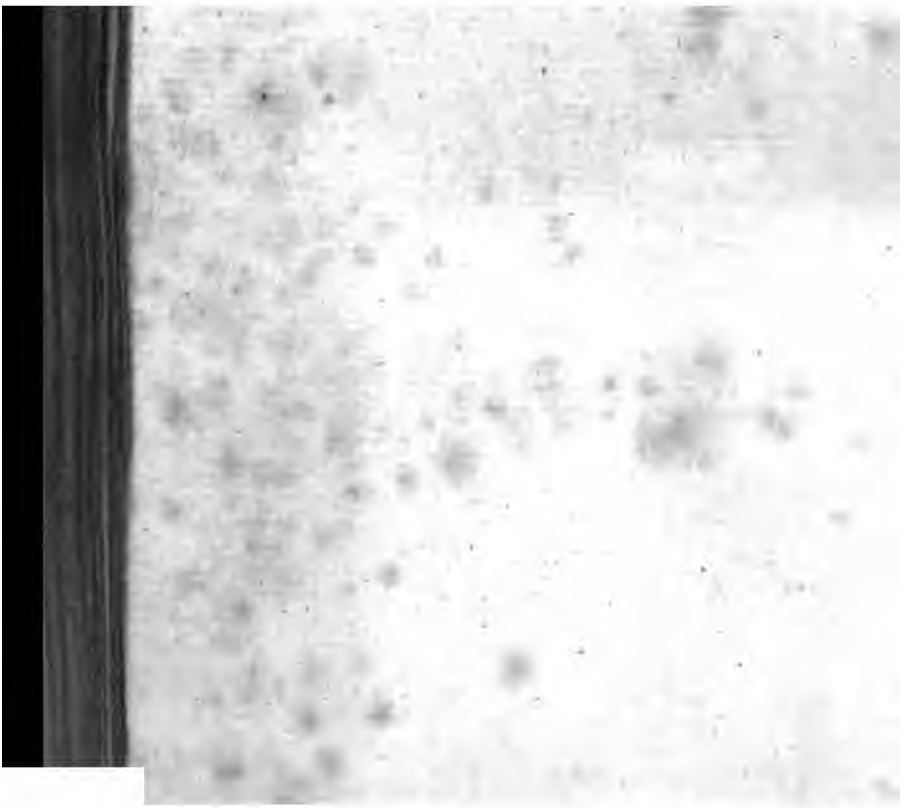
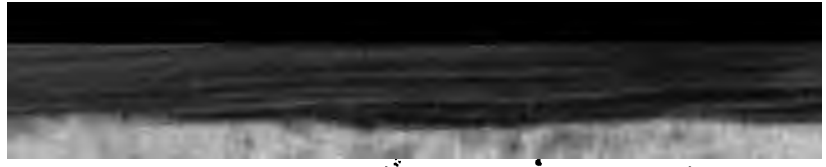
Page 53, l. 10. *for* 14 G. II, *read* 24 G. II.
147, c, *delete* touching this magiſtracy.
374, a, for *caledam* read *calidam*.
203, l. 8. place the reference to note b, at the word "counſel," and not at "aſſize."

VOLUME II.

280, l. 5. *for* reſpect with, *read* with reſpect to.
306, l. 5. *for* unanimouſly, *read* unanſwerably.